Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8

CP 55, 19e étage
20, rue queen ouest
Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF
BOREALIS INTERNATIONAL INC., SYNERGY GROUP (2000) INC., INTEGRATED BUSINESS CONCEPTS INC., CANAVISTA CORPORATE SERVICES INC., CANAVISTA FINANCIAL CENTER INC., SHANE SMITH, ANDREW LLOYD, PAUL LLOYD, VINCE VILLANTI, LARRY HALIDAY, JEAN BREAU, JOY STATHAM, DAVID PRENTICE, LEN ZIELKE, JOHN STEPHAN, RAY MURPHY, ALEXANDER POOLE, DEREK GRIGOR, EARL SWITENKY, MICHELLE DICKERSON, DEREK DUPONT, BARTOSZ EKIERT, ROSS MACFARLANE, BRIAN NERDAHL, HUGO PITTOORS and LARRY TRAVIS

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

Hearing:	February 11, 2011	
Decision:	April 29, 2011	
Panel:	Patrick J. LeSage Paulette L. Kennedy	- Chair of the Panel - Commissioner
Appearances:	Yvonne B. Chisholm Usman M. Sheikh	- For Staff of the Commission
	Hugh M. DesBrisay	- For Vince Villanti, Larry Haliday, Borealis International Inc. and Integrated Business Concepts Inc.
	Bruce O'Toole	- For Synergy Group (2000) Inc., Shane Smith, David Prentice and Andrew Lloyd

Aengus Fogarty (via teleconference)	- For Ross Macfarlane
Self-represented (via teleconference):	- Brian Nerdahl - Joy Statham - John Stephan - Ray Murphy - Alexander Poole - Derek Dupont - Hugo Pittoors
No one attended on behalf of these respondents:	- Len Zielke - Michelle Dickerson - Larry Travis

TABLE OF CONTENTS

REASONS FOR DECISION ON SANCTIONS AND COSTS

I. BACKGROUND

[1] On or about January 13, 2011, we issued our Reasons and Decision on the merits of this matter, *Re Borealis International Inc.* (2011), 34 O.S.C.B. 777 (the "Merits Decision"). On February 11, 2011 a sanctions hearing was held. We are satisfied that all of the respondents against whom adverse findings have been made were notified of the hearing.

[2] At the February 11, 2011 hearing, Mr. DesBrisay appeared as counsel for Borealis International Inc. ("Borealis"), Integrated Business Concepts Inc. ("IBC"), Vince Villanti ("Villanti") and Larry Haliday ("Haliday"). Mr. O'Toole appeared as counsel for Synergy Group (2000) Inc. ("Synergy"), Shane Smith ("Smith"), Andrew Lloyd ("Lloyd") and David Prentice ("Prentice").

[3] Submissions were heard from Staff of the Commission ("Staff"), Mr. DesBrisay and Mr. O'Toole. Submissions and comments were received from Joy Statham ("Statham"), John Stephan ("Stephan"), Ray Murphy ("Murphy"), Alexander Poole ("Poole"), Derek Dupont ("Dupont"), Ross Macfarlane ("Macfarlane"), Brian Nerdahl ("Nerdahl") and Hugo Pittoors ("Pittoors"), who attended by conference call. In addition, Mr. Macfarlane had counsel, Aengus Fogarty, with him on the conference call. Mr. Fogarty made submissions primarily as to the application of the law and reasonable conclusions that should be drawn there from regarding the sanctions that might be imposed against Mr. Macfarlane. Each of the self-represented, including Mr. Macfarlane, commented on the nature of their involvement, and in a very broad, general and unsupported fashion, commented on their ability (or inability) to pay a monetary penalty and in some cases, the consequences of any trading ban that might be imposed.

[4] No one appeared for the remaining respondents, Len Zielke ("Zielke"), Michelle Dickerson ("Dickerson") and Larry Travis ("Travis").

[5] Staff filed submissions along with two books of authorities. Written sanctions submissions were received from Mr. DesBrisay on behalf of Villanti, Haliday and IBC, along with affidavits from Villanti and Haliday. A brief of authorities was filed by Mr. O'Toole on behalf of Synergy, Smith, Prentice and Lloyd. A letter was received from Mr. Pittoors.

[6] None of the many investors lost any money. In fact, investors received the promised and generous 18% return on their investments (Merits Decision, *supra* at para. 19). That fact makes this case different from so many of the other enforcement cases before the Commission. However, we have determined that the respondents violated Ontario securities laws and consequently, we now consider the appropriate sanctions.

II. THE MERITS DECISION

[7] The Panel concluded in the Merits Decision that:

(a) all of the respondents except Poole traded in securities in breach of subsection 25(1)(a) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act").

(b) all of the respondents engaged in the distribution of securities in breach of subsection 53(1) of the Act.

(c) Smith, Villanti and Prentice breached section 129.2 of the Act.

(d) there were no registration or prospectus exemptions available to the respondents.

(e) Smith, Villanti, Haliday, Prentice, Stephan, Murphy, Borealis and Synergy participated in a fraud and thereby breached subsection 126.1(b) of the Act.

(f) Smith and Andrew Lloyd breached cease trade orders by their conduct relating to the distribution and sales of the Borealis product.

The allegations against the other respondents in the merits hearing, Paul Lloyd, Jean Breau, Derek Grigor, Earl Switenky, Bartosz Ekiert, Canavista Corporate Services Inc. and Canavista Financial Center Inc., were dismissed (Merits Decision, *supra* at para. 182).

[8] The Panel found that the Borealis Guaranteed Return Investment Certificate (the "Borealis GRIC") was an 'investment contract', and therefore a 'security', as defined in subsection 1(1) of the Act (Merits Decision, *supra* at paras. 59-64). Investors were led to believe that the Borealis GRIC:

> … offered an annual return of between 10% to 18%. All of the more than $16 million of the Borealis GRIC was sold on the basis of an 18% annual return payable at 4.5% quarterly.
>
> …
>
> The investors were advised that the monies raised through the Borealis GRIC would be placed in a trust company, Atlantic Trust Company Inc. ("Atlantic"). The monies so placed would permit Atlantic to provide loans to small and medium-sized businesses, in particular businesses with a connection to [Villanti] and/or [IBC].
>
> (Merits Decision, *supra* at paras. 1, 3)

Further, as noted at paragraphs 13 and 14 of the Merits Decision:

> … The Borealis/Synergy promotional documents for this GRIC were very descriptive and stressed throughout the 'guaranteed' component of the product. In particular, they stressed the levels of insurance which included reinsurance. …
>
> Investors consistently testified that they were each promised their investment was guaranteed, with multiple levels of protection that included CDIC protection and reinsurance coverage.
>
> (Merits Decision, *supra* at paras. 13, 14)

[9] The Panel concluded that the actual terms of the Borealis GRIC were not as represented to investors. The total amount invested ($16 million plus) had insurance coverage of only $100,000. This was the $100,000 provided for the total deposits in the Borealis bank account by the Canadian Deposit Insurance Corporation. The beneficiary was Borealis, not the investors (Merits Decision, *supra* at para. 16). In addition:

> … Atlantic never received any of the investments, nor was it ever in a position to receive any of the investments. Further, there was never any real connection between Borealis, IBC, Synergy and any of Atlantic, SwissRe, Credit Suisse or Lloyds of London, as had been purported.
>
> (Merits Decision, *supra* at para. 18)

[10] In the end, no Borealis GRIC investors lost any money. Notwithstanding the false representations about insurance protection, investors were repaid their capital and received 18% interest on their investment. This result was made possible only because of gratuitous payments in excess of $2 million (or, with sales commission payments, in excess of $4 million), made by

Villanti and his company IBC to honour the Borealis GRIC payment terms (Merits Decision, *supra* at para. 19).

III. SANCTIONS

A. Sanctions Requested by Staff

Sanctions requested against Smith, Villanti, Prentice, Haliday, Stephan and Murphy

[11] Staff seek the following sanctions against each of Smith, Villanti, Prentice, Haliday, Stephan and Murphy for their breaches of Ontario securities law and conduct contrary to the public interest:

- an order that they cease trading in securities permanently;
- an order that they be prohibited permanently from acquiring any securities;
- an order that exemptions contained in Ontario securities law do not apply to each of them permanently;
- an order reprimanding each of them;
- an order that they resign all positions they may hold as director or officer of an issuer;
- an order that they be prohibited permanently from becoming or acting as a director or officer of an issuer;
- an order that Smith, Villanti, Prentice and Haliday each pay an administrative penalty of $750,000 and that Stephan and Murphy each pay an administrative penalty of $500,000; and
- an order that Smith, Prentice, Stephan and Murphy disgorge the following amounts which they obtained as a result of their non-compliance with Ontario securities law:
    - Smith $1,026,949.78
    - Prentice $261,806.01

- Stephan $127,887.99
- Murphy $71,382.45

Sanctions requested against Lloyd

[12] Staff seek the following sanctions orders against Lloyd for his breaches of subsections 25(1), and 53(1) of the Act, his breach of a cease trade order issued against him in another matter and his conduct contrary to the public interest:

- an order that he cease trading in securities permanently;
- an order that he be prohibited permanently from acquiring any securities;
- an order that exemptions contained in Ontario securities law do not apply to him permanently;
- an order reprimanding him;
- an order that he resign all positions he may hold as director or officer of an issuer;
- an order that he be prohibited permanently from becoming or acting as a director or officer of an issuer;
- an order that he pay an administrative penalty of $500,000; and
- an order that he disgorge all amounts that he obtained as a result of his non-compliance with Ontario securities law, $42,049.85.

Sanctions requested against Poole

[13] Staff seek the following sanctions orders against Poole for breaching subsection 53(1) of the Act and acting contrary to the public interest:

- an order that he cease trading in securities permanently;
- an order that he be prohibited permanently from acquiring any securities;

- an order that exemptions contained in Ontario securities law do not apply to him permanently;
- an order reprimanding him;
- an order that he resign all positions he may hold as director or officer of an issuer;
- an order that he be prohibited permanently from becoming or acting as a director or officer of an issuer;
- an order that he pay an administrative penalty of $250,000; and
- an order that he disgorge all amounts that he obtained as a result of his non-compliance with Ontario securities law, $83,720.97.

Sanctions requested against Statham, Zielke, Dickerson, Dupont, Macfarlane, Nerdahl, Pittoors and Travis

[14] Staff seek the following orders against each of Statham, Zielke, Dickerson, Dupont, Macfarlane, Nerdahl, Pittoors and Travis for their breaches of subsections 25(1) and 53(1) of the Act and the conduct contrary to the public interest:

- an order that they cease trading in securities for a period of 15 years;
- an order that they be prohibited from acquiring any securities for a period of 15 years;
- an order that exemptions contained in Ontario securities law do not apply to each of them for a period of 15 years;
- an order reprimanding each of them;
- an order that they resign all positions they may hold as director or officer of an issuer;
- an order that they be prohibited from becoming or acting as a director or officer of an issuer for a period of 15 years;
- an order that they each pay an administrative penalty of $100,000; and

- an order that they disgorge the following amounts they obtained as a result of their non-compliance with Ontario securities law:

    - Statham $36,548.39
    - Zielke $133,381.37
    - Dickerson $39,982.14
    - Dupont $55,241.36
    - Macfarlane $204,355.92
    - Nerdahl $136,912.69
    - Pittoors $135,941.53
    - Travis $11,903.23

Sanctions requested against the Corporate Respondents

[15] Staff seek the following orders against Borealis, Synergy and IBC for their breaches of Ontario securities law and conduct contrary to the public interest:

- an order that Borealis and Synergy cease trading in securities permanently and that IBC cease trading in securities for a period of 15 years;
- an order that Borealis and Synergy be prohibited from acquiring any securities permanently and that IBC be prohibited from acquiring any securities for a period of 15 years;
- an order that exemptions contained in Ontario securities law do not apply to Borealis and Synergy permanently and that they do not apply to IBC for a period of 15 years;
- an order reprimanding Borealis, Synergy and IBC; and
- an order that Borealis and Synergy each pay an administrative penalty of $500,000 and IBC pay an administrative penalty of $100,000.

B. The Law on Sanctions

[16] The Commission does not impose sanctions to punish past conduct, but must act in accordance with its dual mandate of (i) investor protection, and (ii) fostering fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act). Sanctions must therefore be for the purpose of preventing and restraining future conduct that may be harmful to investors or the capital markets. The Commission's role in ordering sanctions is outlined in *Re Mithras Management Ltd.*:

> … 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 [now 122] 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.
>
> (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611)

[17] If it is in the public interest, we may order sanctions restricting or banning respondents from participating in the Ontario capital markets. The Supreme Court of Canada has stated that:

> … the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.
>
> (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 43)

[18] When determining what sanctions are appropriate in this matter, we should consider any relevant factors, including:

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

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

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

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

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

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

(g) the size of any financial sanction or voluntary payment;

(h) the effect any sanction may have on the livelihood of a respondent;

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

(j) the reputation and prestige of the respondent;

(k) the remorse of the respondent;

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

(m) any mitigating factors.

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

[19] The Commission may consider general deterrence when determining the appropriate sanctions. As the Supreme Court of Canada noted in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60: "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

[20] Ultimately, any sanctions imposed must be proportionate to the circumstances and conduct of each respondent (*Re M.C.J.C. Holdings Inc.*, *supra* at para. 10).

C. Analysis of the Sanctioning Factors Applicable in this Case

Voluntary Payments by the Respondents

[21] As we stated in the Merits Decision, *supra* at paragraph 19:

> Notwithstanding the misrepresentations in the sales pitch … none of the investors lost any money. The investors were repaid their capital and in addition were paid the promised and generous (18%) interest rate for their investments. This satisfactory result occurred … solely because Villanti, the President of Borealis and his company, IBC, paid out of their own pockets an amount probably in excess of $2 million to honour the payment terms of the Borealis GRIC.

[22] We are now satisfied that the total out-of-pocket cost to Villanti, Borealis and IBC was probably in excess of $4 million, having regard to the interest paid to the investors, the cost of the Receiver to distribute the funds and the commissions and expenses paid for the sale of these securities (all of which exclude the legal costs of Villanti, Haliday, Borealis and IBC).

Amounts Received by the Respondents

[23] We agree with Mr. O'Toole's submission that we should not consider any commissions or overrides that respondents received for transactions with the Croatian Credit Union in our assessment of the appropriate sanctions. In the Merits Decision, we did not find it necessary to make findings as to whether these transactions constituted trading or distributions of securities. Therefore, we do not include any monies received by respondents as commissions on the Croatian Credit Union transactions in our consideration of any financial benefits to respondents resulting from their activities in breach of Ontario securities law.

[24] Smith, Prentice, Lloyd, Statham, Zielke, Stephan, Murphy, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis received commissions for their sales of the Borealis GRIC product or sales made by sales agents under their management. We note that many, but not all, of the commissions paid do not appear to be excessive and that these included the sales persons' overhead and costs, and in some cases, the sharing of the commission with others.

[25] Not including any commissions for transactions with the Croatian Credit Union, Smith received $955,190.68 and Prentice received $243,866.23. The sales agents and regional managers received commissions ranging from $11,903.23 (received by Travis) to $203,872.12 (received by Macfarlane).

[26] We accept Haliday's statements in his affidavit sworn on February 9, 2011 that:

> … I received no commissions or overrides or other compensation for my involvement in the Borealis GRIC.
>
> … I am a salaried employee of IBC and my role is administrative. …

[27] As we noted previously, Villanti, Borealis and IBC received no financial benefit from their breaches of Ontario securities law. On the contrary, they paid what is likely in excess of $4 million to provide investors with an 18% return and compensate Synergy sales persons and managers for sales of the Borealis GRIC.

The Seriousness of the Respondents' Conduct

[28] A large number of the respondents were found to have violated subsections 25(1) and 53(1) of the Act, based on the panel's conclusion that the Borealis GRIC was a 'security'. Although the respondents ought to have known this product was a security, we are satisfied from the submissions made both at the merits hearing, and more particularly at the sanctions hearing, that most of the respondents (those with a lesser role in the Borealis GRIC program) did not know that the product they were selling was a security.

[29] Smith and Prentice, on the other hand, were engaged in conduct that was more serious and indicates weightier sanctions. In addition to breaching subsections 25(1) and 53(1), Smith and Prentice engaged in conduct relating to securities that was fraudulent and authorized, permitted and acquiesced in Synergy's and Borealis's breaches of the Act, contrary to subsections 126.1(b) and 129.2 of the Act, respectively. As noted in the Merits Decision:

> Smith had probably greater involvement in the Borealis GRIC program than any of the other individual respondents. Smith was a catalyst, along with Villanti, in the creation of the Borealis GRIC program. He, as President and *de facto* operating mind of Synergy, and Prentice, were the marketing and sales organizers for this product. …
>
> Smith and Prentice, both directly and through Synergy and its representatives across the country, became the principal, if not sole, marketers of the Borealis product. As indicated earlier, Smith and Prentice began the sales pitch by way of website and meetings in late March 2007. They continued their marketing and

> sales of the Borealis product until the Commission froze the Borealis RBC account in December 2007. …
>
> (Merits Decision at paras. 73-74)

[30] In addition, Smith, along with Lloyd, breached the terms of a temporary cease trade order issued against them in another proceeding by trading in the Borealis GRIC product. Breaches of a cease trade order of the Commission are serious and should not be treated lightly.

[31] Villanti, Haliday, Murphy, Stephan, Borealis and Synergy breached subsections 25(1) and 53(1) of the Act, and, like Smith and Prentice, also engaged in conduct relating to securities that was fraudulent, contrary to subsection 126.1(b) of the Act.

[32] Notwithstanding Villanti's original honourable intentions with respect to the Borealis GRIC program, he still engaged in conduct that was fraudulent:

> … The contractual obligation entered into with the investors was based on a number of false premises. It was misleading. It was fraudulent. Borealis, Villanti and Haliday's 'after the fact' letter did not change the fact that the investment contracts entered into, with the acquiescence of Villanti were false and misleading. For all these reasons, we, therefore, notwithstanding Villanti's original honourable intention, conclude that he violated subsection 126.1(b) of the Act. …
>
> (Merits Decision, *supra* at para. 108)

[33] We found the following regarding Haliday's fraudulent conduct in the Merits Decision:

> Haliday may have been a passive 'trader' but he was an important participant in the sale of the security. …
>
> …
>
> This partial information, this misinformation, and the failure to correctly and accurately inform clearly constitutes deceit and material misrepresentation.
>
> (Merits Decision, *supra* at paras. 116, 118)

[34] In the Merits Decision, the panel found that Stephan provided investors with information that he knew, or reasonably ought to have known was false and that Murphy continued to receive override payments for sales conducted after he was notified that the security promised investors was not in place (Merits Decision, *supra* at paras. 132, 138 and 140).

[35] Smith and Synergy were sent a Warning Notice from the Office of the Superintendent of Financial Institutions of Canada. SwissRe sent a 'cease and desist' letter to Borealis, Synergy, Smith, Villanti, IBC and Murphy (Merits Decision, *supra* at paras. 78, 80, 125). Despite these warnings about the fraudulent nature of the program, sales of the Borealis GRIC continued.

The Deterrent Effect of Sanctions

[36] We agree with Mr. DesBrisay's submission that the more than $4 million out-of-pocket payments made by Villanti, Borealis and IBC should deter these respondents and others from engaging in similar conduct. We see no deterrent purpose in requiring these respondents to pay any administrative penalty in addition to payments already made.

[37] Similarly, this proceeding and the Merits Decision appear to have had an impact on the lives of those respondents who engaged in unregistered trades and distributions of the Borealis GRIC, but who were not involved in the fraudulent scheme to same extent as Smith and Prentice. We find that, for these respondents, additional sanctions that include restrictions on participation in the capital markets and an administrative penalty, as noted below in our Conclusion, should sufficiently deter future similar behaviour.

The Repeated Conduct of Smith and Lloyd

[38] Both Smith and Lloyd previously breached Ontario securities law and acted contrary to the public interest, as concluded by the Commission panel in *Re Sabourin* (2009), 32 O.S.C.B. 2707. Although the hearing in *Re Sabourin* had not been conducted by the time of the Borealis GRIC sales, Smith and Lloyd were subject to a temporary cease trade order when they engaged in the breaches of Ontario securities law relating to trades in the Borealis GRIC.

The Respondents' Current Circumstances and the Effect of Sanctions

[39] We take note of the comments and submissions from some of the respondents, although totally unsupported by any documentary evidence, as to their current financial situation. Many of the respondents, including Nerdahl, Statham, Dupont and Murphy, indicated in their submissions that they are in financial difficulty and do not have the means to pay the administrative penalties requested by Staff.

[40] We note that one of the respondents, Pittoors, is 78 years of age, in poor health and appears not to be a person of significant means. Similarly, in the case of Macfarlane, we note that he is a young man who hopes to be able to earn a living in sales to support his family, which includes two young children. A number of the respondents, including Poole and Dupont, stated that the allegations and findings in this case have already significantly impaired their ability to obtain employment and earn an income.

D. Overview of the Issues Involved in this Matter Relative to the Sanctions to be Imposed

Disgorgement

[41] As we noted above, the total out-of-pocket cost to Villanti, Borealis and IBC, including payments to investors and commissions payments, was probably more than $4 million.

[42] Dealing first with the issue of disgorgement: We do not dispute Staff's position that disgorgement is an appropriate sanction in many cases. However, having regard to the circumstances in this matter, including the fact that no investor is 'out of pocket', we are satisfied that disgorgement is neither appropriate nor necessary. We note that any order requiring that respondents disgorge the commissions they received would essentially be an order to disgorge to the Commission money paid to them by Villanti or IBC.

[43] We note in the very recent decision from this Commission in *Re Al-tar Energy Corp.* (2011), 34 O.S.C.B. 447 that the Commissioners on the sanctions hearing made the following comments at paragraph 71:

> Accordingly, we will order that the Individual Respondents involved in the fraudulent scheme with a particular Corporate Respondent, disgorge on a joint and several basis … That appears to us to be the appropriate approach in the circumstances before us …

Then later at paragraph 74, they state:

> Any amounts paid to the Commission in compliance with our administrative penalty and disgorgement orders shall be allocated to or for the benefit of third parties, <u>including investors who lost money as a result of investing in the investment scheme</u> … These amounts are to be distributed to <u>investors who lost money as a result of investing in the investment scheme</u> …
>
> [emphasis ours]

[44] That of course is not the circumstance in this case. No disgorgement order will be made.

Administrative Penalties

[45] As we have noted throughout this decision, this case is distinguishable from most other cases before the Commission because investors were returned the principal amount they invested plus interest of 18%. However, the conduct of the respondents did violate Ontario securities law, and as such we find that some administrative penalty is appropriate. We therefore find that administrative penalties in the range of $2,500 are appropriate for the respondents who were involved in sales of the Borealis GRIC, but did not engage in fraudulent conduct.

[46] With regards to those respondents who perpetrated a fraud, their conduct was far more serious than the respondents who solely made illegal trades and distributions of the Borealis GRIC. We refer to a recent Commission decision, which discusses administrative penalties where there has been fraudulent conduct:

> The Individual Respondents engaged in fraudulent conduct that warrants the imposition of substantial administrative penalties. … 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 a cost of carrying out a fraudulent scheme.
>
> (*Re Al-Tar Energy Corp., supra* at para. 49)

[47] In *Re Al-Tar Energy Corp.*, *supra*, investors lost the majority of the over $650,000 invested in the fraudulent scheme. The Borealis GRIC investors were paid back the amount raised from them, plus the interest they were promised. However, given the seriousness of the fraudulent conduct, higher administrative penalties are warranted for those respondents who breached subsection 126.1(b) of the Act, so as to deter similar fraudulent behaviour in the future.

[48] Smith and Prentice, who were principally involved in the fraudulent scheme, as noted at paragraphs [29] and [30], engaged in conduct that should result in higher administrative penalties. Although not so involved in the development and marketing of the fraudulent scheme as Smith and Prentice, Murphy and Stephan also engaged in conduct that perpetrated a fraud, and as such, should pay an administrative penalty that will sufficiently deter this type of serious

misconduct in the future. We impose administrative penalties of $550,000 each against Smith and Prentice. We impose an administrative penalty of $15,000 against Murphy and $25,000 against Stephan.

[49] Lloyd, although significantly involved in the Borealis GRIC project, was not found to have violated the fraud provision of the Act. Lloyd, like Smith, did violate a previous Commission cease trade order. His administrative penalty should be $300,000.

[50] As noted at paragraph [36], the payment of what is likely over $4 million should be sufficient to deter future fraudulent behaviour of the nature in which Villanti, Haliday, IBC and Borealis were engaged. We therefore do not find that administrative penalties should be ordered against these respondents.

Prohibitions on Participation in the Capital Markets

[51] Participation in the capital markets is a privilege, not a right (*Erikson v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1622 (Div. Ct.) at para. 47). Staff requests that we prohibit trading by Smith, Villanti, Prentice, Haliday, Stephan, Murphy, Lloyd and Poole permanently and that the remaining individual respondents be prohibited from trading for 15 years.

[52] Most of the respondents in this case can be distinguished from the respondent in *Re St. John*, about whom the commission noted:

> In our view [the respondent] is not a person whom we can safely trust to participate in the capital markets in any way. We have no confidence whatsoever that if she is permitted to participate as an investor for her own account, [she] will not once again push the envelope by engaging in conduct which is detrimental to others and abusive to the capital markets. Accordingly we order that trading in any securities by [the respondent] cease permanently.
>
> (*Re St. John* (1998), 21 O.S.C.B. 3851 at 3867)

[53] Although we think it appropriate to issue an order restricting the respondents' trading and ability to act as directors or officers of issuers, we find that bans of 2 to 4 years, as noted in our Conclusion below, are sufficient for most respondents given their involvement in the Borealis GRIC sales and our level of concern regarding their future conduct in the capital markets.

[54] The conduct of Smith, Prentice and Lloyd, however, causes reason for greater concern. Smith and Prentice were the marketing and sales organizers of the Borealis GRIC product, as noted at paragraphs 73 and 74 of the Merits Decision, *supra*. The Borealis GRIC sales conducted and/or overseen by Smith and Lloyd were made while they were both subject to a cease trade order of this Commission (Merits Decision, *supra* at paras. 89 and 91). For these reasons, we find it appropriate to order permanent bans on Smith's, Prentice's and Lloyd's participation in the capital markets.

[55] We believe it is appropriate to permit limited carve-outs from these trading restrictions to permit the Respondents to trade in securities for their RRSPs. In the case of Smith, Prentice and Lloyd, in light of the seriousness of their conduct and to ensure the objective of individual and general deterrence is met, we believe it is appropriate to add a condition to the availability of carve-outs from their trading restrictions. We consider it to be in the public interest to add a term and condition to their permanent restrictions on trading to permit them to trade in securities for their RRSPs only upon payment of their respective administrative penalties and costs orders. Until such time, Smith, Prentice and Lloyd shall remain subject to a permanent order prohibiting them from trading in or acquiring securities.

IV. COSTS

[56] Staff seek an order representing a portion of the costs of the hearing requiring Smith, Villanti, Haliday, Prentice, Stephan, Murphy, Borealis and Synergy be assessed $125,000 costs on a joint and several basis. Staff requests an order that Lloyd, Statham, Zielke, Dickerson, Dupont, Macfarlane, Nerdahl, Pittoors, Travis, Poole and IBC each pay $5,000 in costs.

[57] We consider Staff's request of reimbursement for $180,000, which is but a small portion of the total cost of the investigation and prosecution of this matter, to be extremely reasonable.

[58] However, we find it appropriate to order costs only against those respondents who played a more significant role in the Borealis GRIC program and/or who breached the terms of a previous cease trade order of the Commission. We therefore find that as terms and conditions of the order regarding costs, Borealis, IBC, Villanti and Haliday shall pay costs of $60,000 on a joint and several basis. Synergy, Smith and Prentice shall pay costs of $115,000 on a joint and several basis. Lloyd shall pay costs of $5,000.

V. CONCLUSION ON SANCTIONS AND COSTS

[59] We find that it is in the public interest to make the following orders against the Respondents:

1. With respect to Smith, Prentice and Synergy:

    (a) Smith, Prentice and Synergy are prohibited from trading in securities permanently, pursuant to clause 2 of subsection 127(1) of the Act;

    (b) Smith, Prentice and Synergy are prohibited from acquiring securities permanently, pursuant to clause 2.1 of subsection 127(1) of the Act;

    (c) exemptions in Ontario securities law (as defined in the Act) do not apply to Smith, Prentice and Synergy permanently, pursuant to clause 3 of subsection 127(1) of the Act;

    (d) Smith, Prentice and Synergy are reprimanded, pursuant to clause 6 of subsection 127(1) of the Act;

    (e) Smith and Prentice are ordered to resign any positions they hold as directors or officers of any issuer, pursuant to clause 7 of subsection 127(1) of the Act;

    (f) Smith and Prentice are prohibited permanently from becoming or acting as a director or officer of any issuer, pursuant to clause 8 of subsection 127(1) of the Act;

    (g) each of Smith, Prentice and Synergy shall pay an administrative penalty of $550,000 to be allocated to or for the benefit of third parties, pursuant to subsection 3.4(2)(b) of the Act for his or its non-compliance with Ontario securities law, pursuant to clause 9 of subsection 127(1) of the Act;

    (h) Smith, Prentice and Synergy shall pay costs of $115,000, on a joint and several basis, pursuant to section 127.1 of the Act; and

(i) as a term and condition of the sanctions referred to at paragraphs 1. (a) and (b) of this Order, upon payment of their respective administrative penalties and costs amounts as set out in paragraphs 1. (g) and (h) of this Order, Smith and Prentice shall be entitled to trade in and acquire securities for the account of their respective registered retirement savings plans (as defined in the *Income Tax Act* (Canada)) in which they and/or their respective spouses have sole legal and beneficial ownership, provided that:

(i) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer;

(ii) they do not own legally or beneficially (in the aggregate, together with their respective spouses) more than one percent of the outstanding securities of the class or series of the class in question; and

(iii) they carry out any permitted trading through a registered dealer and through trading accounts opened in their respective names only.

2. With respect to Villanti, Haliday, IBC and Borealis:

(a) Villanti is prohibited from trading in securities for a period of 5 years, pursuant to clause 2 of subsection 127(1) of the Act, with the exception that he is permitted to trade securities for the account of his registered retirement savings plan (as defined in the *Income Tax Act* (Canada)) in which he and/or his spouse have sole legal and beneficial ownership, provided that:

(i) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer;

(ii) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question; and

(iii) he carries out any permitted trading through a registered dealer and through trading accounts opened in his name only;

(b) Villanti is prohibited from acquiring securities for a period of 5 years, pursuant to clause 2.1 of subsection 127(1) of the Act, except to allow the trading in securities permitted by and in accordance with paragraph 2. (a) of this Order;

(c) exemptions in Ontario securities law (as defined in the Act) do not apply to Villanti for a period of 5 years, pursuant to clause 3 of subsection 127(1) of the Act;

(d) Haliday is prohibited from trading in securities for a period of 4 years, pursuant to clause 2 of subsection 127(1) of the Act, with the exception that he is permitted to trade securities for the account of his registered retirement savings plan (as defined in the *Income Tax Act* (Canada)) in which he and/or his spouse have sole legal and beneficial ownership, provided that:

(i) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer;

(ii) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question; and

(iii) he carries out any permitted trading through a registered dealer and through trading accounts opened in his name only;

(e) Haliday is prohibited from acquiring securities for a period of 4 years, pursuant to clause 2.1 of subsection 127(1) of the Act, except to allow the trading in securities permitted by and in accordance with paragraph 2. (d) of this Order;

(f) exemptions in Ontario securities law (as defined in the Act) do not apply to Haliday for a period of 4 years, pursuant to clause 3 of subsection 127(1) of the Act;

(g) IBC and Borealis are prohibited from trading in securities for a period of 5 years, pursuant to clause 2 of subsection 127(1) of the Act;

(h) IBC and Borealis are prohibited from acquiring securities for a period of 5 years, pursuant to clause 2.1 of subsection 127(1) of the Act;

(i) exemptions in Ontario securities law (as defined in the Act) do not apply to IBC and Borealis for a period of 5 years, pursuant to clause 3 of subsection 127(1) of the Act;

(j) Villanti, Haliday, IBC and Borealis are reprimanded, pursuant to clause 6 of subsection 127(1) of the Act;

(k) Villanti and Haliday are ordered to resign any positions they hold as directors or officers of any issuer, pursuant to clause 7 of subsection 127(1) of the Act;

(l) Villanti is prohibited for a period of 5 years from becoming or acting as a director or officer of any issuer, pursuant to clause 8 of subsection 127(1) of the Act;

(m) Haliday is prohibited for a period of 4 years from becoming or acting as a director or officer of any issuer, pursuant to clause 8 of subsection 127(1) of the Act; and

(n) Villanti, Haliday, IBC and Borealis shall pay costs of $60,000, on a joint and several basis, pursuant to section 127.1 of the Act;

3. With respect to Lloyd:

(a) Lloyd is prohibited from trading in securities permanently, pursuant to clause 2 of subsection 127(1) of the Act;

(b) Lloyd is prohibited from acquiring securities permanently, pursuant to clause 2.1 of subsection 127(1) of the Act;

(c) exemptions in Ontario securities law (as defined in the Act) do not apply to Lloyd permanently, pursuant to clause 3 of subsection 127(1) of the Act;

(d) Lloyd reprimanded pursuant to clause 6 of subsection 127(1) of the Act;

(e) Lloyd is ordered to resign any positions he holds as a director or officer of any issuer, pursuant to clause 7 of subsection 127(1) of the Act;

(f) Lloyd is prohibited permanently from becoming or acting as a director or officer of any issuer, pursuant to clause 8 of subsection 127(1) of the Act;

(g) Lloyd shall pay an administrative penalty of $300,000 to be allocated to or for the benefit of third parties, pursuant to subsection 3.4(2)(b) of the Act for his non-compliance with Ontario securities law, pursuant to clause 9 of subsection 127(1) of the Act;

(h) Lloyd shall pay costs of $5,000 pursuant to section 127.1 of the Act; and

(i) as a term and condition of the sanctions referred to at paragraphs 3. (a) and (b) of this Order, upon payment of the administrative penalties and costs amount set out in paragraphs 3. (g) and (h) of this Order, Lloyd shall be entitled to trade in and acquire securities for the account his registered retirement savings plan (as defined in the *Income Tax Act* (Canada)) in which he and/or his spouse have sole legal and beneficial ownership, provided that:

    (i) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer;

    (ii) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question; and

    (iii) he carries out any permitted trading through a registered dealer and through trading accounts opened in his name only.

4. With respect to Stephan and Murphy:

(a) Stephan and Murphy are prohibited from trading in securities for a period of 4 years, pursuant to clause 2 of subsection 127(1) of the Act, with the exception that they are permitted to trade securities for the account of their respective registered retirement savings plans (as defined in the *Income Tax Act* (Canada)) in which they and/or their respective spouses have sole legal and beneficial ownership, provided that:

(i) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer;

(ii) they do not own legally or beneficially (in the aggregate, together with their respective spouses) more than one percent of the outstanding securities of the class or series of the class in question; and

(iii) they carry out any permitted trading through a registered dealer and through trading accounts opened in their respective names only;

(b) Stephan and Murphy are prohibited from acquiring securities for a period of 4 years, pursuant to clause 2.1 of subsection 127(1) of the Act, except to allow the trading in securities permitted by and in accordance with paragraph 4. (a) of this Order;

(c) exemptions in Ontario securities law (as defined in the Act) do not apply to Stephan and Murphy for a period of 4 years, pursuant to clause 3 of subsection 127(1) of the Act;

(d) Stephan and Murphy are reprimanded, pursuant to clause 6 of subsection 127(1) of the Act;

(e) Stephan and Murphy are ordered to resign any positions they hold as directors or officers of any issuer, pursuant to clause 7 of subsection 127(1) of the Act;

(f) Stephan and Murphy are prohibited for a period of 4 years from becoming or acting as a director or officer of any issuer, pursuant to clause 8 of subsection 127(1) of the Act;

(g) Stephan shall pay an administrative penalty of $25,000 to be allocated to or for the benefit of third parties, pursuant to subsection 3.4(2)(b) of the Act for his non-compliance with Ontario securities law, pursuant to clause 9 of subsection 127(1) of the Act; and

(h) Murphy shall pay an administrative penalty of $15,000 to be allocated to or for the benefit of third parties, pursuant to subsection 3.4(2)(b) of the Act for his non-compliance with Ontario securities law, pursuant to clause 9 of subsection 127(1) of the Act;

5. With respect to Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis:

(a) Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis are prohibited from trading in securities for a period of 2 years, pursuant to clause 2 of subsection 127(1) of the Act, with the exception that they are permitted to trade securities for the account of their respective registered retirement savings plans (as defined in the *Income Tax Act* (Canada)) in which they and/or their respective spouses have sole legal and beneficial ownership, provided that:

(i) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer;

(ii) they do not own legally or beneficially (in the aggregate, together with their respective spouses) more than one percent of the outstanding securities of the class or series of the class in question; and

(iii) they carry out any permitted trading through a registered dealer and through trading accounts opened in their respective names only;

(b) Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis are prohibited from acquiring securities for a period of 2 years, pursuant to clause 2.1 of subsection 127(1) of the Act, except to allow the trading in securities permitted by and in accordance with paragraph 5. (a) of this Order;

(c) exemptions in Ontario securities law (as defined in the Act) do not apply to Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis for a period of 2 years, pursuant to clause 3 of subsection 127(1) of the Act;

(d) Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis are reprimanded, pursuant to clause 6 of subsection 127(1) of the Act;

(e) Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis are ordered to resign any positions they hold as directors or officers of any issuer, pursuant to clause 7 of subsection 127(1) of the Act;

(f) Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis are prohibited for a period of 2 years from becoming or acting as a director or officer of any issuer, pursuant to clause 8 of subsection 127(1) of the Act; and

(g) each of Statham, Zielke, Dickerson, Dupont, Poole, Macfarlane, Nerdahl, Pittoors and Travis shall pay an administrative penalty of $2,500 to be allocated to or for the benefit of third parties, pursuant to subsection 3.4(2)(b) of the Act for his or her non-compliance with Ontario securities law, pursuant to clause 9 of subsection 127(1) of the Act.

[60] We believe these sanctions are appropriate relative to each respondent's involvement in the creation and sales of the Borealis GRIC product. We will issue a separate order giving effect to this decision on sanctions and costs.

Dated at Toronto this 29th day of April, 2011.

"Patrick J. LeSage"	*"Paulette L. Kennedy"*
Patrick J. LeSage	Paulette L. Kennedy