ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Bennett, 2017 ABASC 177 **Date: 20171122**

Wayne Loderick Bennett

Panel:	Tom Cotter Kate Chisholm, QC Webster Macdonald, QC
Representation:	Heather Currie for Commission Staff Andrew Wilson for the Respondent
Submissions Completed:	August 17, 2017
Decision:	November 22, 2017

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I. INTRODUCTION

[1] Alberta Securities Commission (**ASC**) staff (**Staff**) alleged that Wayne Loderick Bennett (**Bennett**), in connection with the distribution of securities of Environmental Sentry Services Inc., also known as Environmental Sentry Services, Inc. (**ESSI**), contravened the *Securities Act* (Alberta) (the **Act**) and acted contrary to the public interest.

[2] Bennett and Staff entered into an Agreed Statement of Facts and Admissions (the **Statement**) dated July 21, 2017, in which Bennett – voluntarily and with the benefit of independent legal advice – admitted that he breached certain provisions of the Act and that such misconduct was contrary to the public interest.

[3] We held a hearing to consider whether Bennett was liable in respect of Staff's allegations in light of the Statement, and to assess sanctions (if any) against him in respect of such misconduct. To that end, we received documentary evidence (including the Statement) and heard submissions from counsel for Staff and for Bennett.

[4] For the reasons set out below, we find, consistent with the Statement, that Bennett contravened the Act. Accordingly, we are imposing on Bennett an array of permanent market-access bans and a $50,000 administrative penalty, and ordering him to pay $30,000 of the investigation and hearing costs.

II. FACTUAL BACKGROUND

[5] We summarize here the pertinent facts, derived from the evidence admitted with the consent of both parties, including the Statement and transcripts from Bennett's interview with investigators on May 28, 2015 (the **Interview**).

[6] Bennett, an Alberta resident, was the founder, president, sole director, a shareholder, and the guiding mind of ESSI since its incorporation until at least early 2016 when he resigned his positions as director and officer.

[7] ESSI, a federally incorporated company, was in the business of manufacturing and distributing hydrocarbon remediation products to aid in the recovery of petroleum spills. As of February 2015, Bennett and his spouse collectively held ESSI shares representing "approximately 29% control in ESSI", although they later purported to relinquish their voting rights in ESSI. As of May 2015, Bennett was drawing a salary from ESSI of $15,000 per month, from which approximately $5,000 went towards ESSI's corporate expenses. At all material times, ESSI did not generate significant or consistent revenues, and was kept financially afloat solely by investor funds.

[8] Between September 8, 2010 and September 8, 2016, Bennett directly and indirectly raised approximately $3.8 million for ESSI by distributing Class "A" common shares and debentures to at least 100 investors in Alberta and Ontario. ESSI has never filed a prospectus or an offering memorandum with the ASC.

[9] In approximately July 2014, Bennett retained a law firm to assist in complying with Alberta securities laws. ESSI's corporate counsel then filed "late reports of exempt distribution"

with the ASC in respect of capital raised for ESSI between 2006 and 2013. According to these reports, about half of the amounts had been raised in reliance on the "close-connection exemption" established by s. 2.5 of National Instrument 45-106 *Prospectus and Registration Exemptions* (**NI 45-106**) and the other half in reliance on s. 2.3 of NI 45-106 (the accredited investor exemption).

[10] It was common ground that the exempt distribution reports were partially inaccurate given the absence of any inquiry into whether investors were eligible for the claimed exemptions; we understood from the Statement and from counsel's representations that investors were not asked questions about their eligibility for the accredited investor prospectus exemption, and that some investors were instructed to complete subscription agreements indicating that they were close friends of Bennett, when in fact most of those investors were not close friends. Staff acknowledged that their investigation identified some investors who met the criteria as an accredited investor and some that did not. Staff's investigation also identified one investor (who invested $49,900) eligible for the close-connection exemption, with a second investor – "a relative of Bennett" – who may have been similarly eligible. At least seven investors (collectively investing about $360,000) "selected the close friend exemption" but did not qualify as such.

[11] In 2013 and 2014, Bennett entered into two agreements with North Star Logistics & Brokerage Inc. (**North Star**) whereby North Star was to (among other things) "[s]eek further investment from prospective new investors into ESSI". An August 27, 2013 letter agreement prepared by North Star and signed by Bennett on behalf of ESSI assigned responsibility to ESSI to determine whether the "high net worth individuals" introduced by North Star would "in fact qualify as . . . appropriate shareholder[s] for ESSI". Bennett knew that neither he nor the proprietor of North Star was "qualifying any investors in any capacity".

[12] Bennett admitted to having caused ESSI's promotional material to represent that ESSI held patents and patents pending for its products. These representations related to six patents, all but one of which were registered in either Canada or the United States of America. According to the Statement, ESSI did not hold any of these patents as of March 2015; three patents had been registered in the name of WLB Holdings Limited (**WLB**), and two other patents were registered in ESSI's name but had been transferred to WLB on February 25, 2015 for nominal consideration. Bennett was the sole director and majority shareholder of WLB, an Alberta company evidently now struck.

[13] In the Interview, Bennett told Staff that two of the six patents were pending and the remaining four were registered, that ESSI and WLB each held two patents and a patent pending, and that "[a]t the right moment, I'll trade all patents into ESSI [so] the investors will own them". Bennett suggested the patent ownership had been divided up between ESSI and WLB to protect the patents for investors, stating that he "had a lot of people come in the back door trying to take us over" and "if somebody tried to backdoor me, I had my patents protected in" WLB. Bennett also told Staff that the total value of the patents had been estimated at approximately $7 million (although it was clear from other statements made in the Interview that there was no credible basis for that estimate) and that the patents might be worth "20 or $30 million".

[14] In the Interview, Bennett acknowledged to Staff that the patents were ESSI's "greatest asset" and that the company did not "really have anything" if it did not have the patents. Bennett also said that his goal was "to protect my investors" and that he "volunteered in front of all of my investors during the AGM that I am more than willing, at no cost to ESSI, to roll my patents into the company" by the end of August 2015; Bennett qualified his statement with the suggestion that "there is going to be some sort of agreement that goes with that. I am going to be 69 here, right. But I will remove my name from the patents".

[15] In the Statement, Bennett admitted that statements contained in ESSI's promotional material (as distributed to prospective investors) were "misrepresentations" and were misleading because they did not disclose that: (i) "ESSI did not own all of the patents and patents pending", and (ii) "ESSI's primary products and intellectual property, being Smart Crumbs and Aqua Fiber, were either not owned by ESSI or not protected by patents".

[16] The Statement also indicated that Bennett "repeatedly told prospective investors that ESSI would soon be 'going public'". When soliciting investments, Bennett promised prospective investors that ESSI would be listed on the Toronto Stock Exchange. Neither Bennett nor ESSI received permission from the ASC's Executive Director to represent that ESSI's securities would be listed on an exchange, nor were they granted approval by, or had they received consent from, any exchange to list ESSI's securities.

[17] Bennett has not been previously sanctioned by the ASC. He cooperated with Staff during their investigation and he has saved the ASC the time and expense associated with a contested hearing on liability under the Act.

[18] Bennett assigned himself into bankruptcy on June 3, 2016. In his bankruptcy filings he claimed ownership of five patents, including the two patents transferred from ESSI to WLB in February 2015. As of the date of the hearing, Bennett had not been discharged from bankruptcy. He was subject to a conditional discharge order and upon the conditions of the order being satisfied he will be eligible to receive an absolute discharge.

III. ANALYSIS CONCERNING THE MERITS OF THE ALLEGATIONS

[19] Staff issued a Notice of Hearing on September 8, 2016 alleging that Bennett and ESSI breached the Act by illegally distributing ESSI securities, making misleading or untrue statements to investors and representing that ESSI "would be going public". Staff also alleged that such conduct was contrary to the public interest. An Amended Notice of Hearing (**ANOH**) dated July 6, 2017 reiterated these allegations against Bennett only, but not against ESSI.

[20] As discussed further below, we find that Bennett breached the provisions of the Act as alleged in the ANOH and admitted in the Statement. In light of this finding, it is unnecessary to consider whether such conduct was also contrary to the public interest.

A. Illegal Distributions

[21] Section 110 of the Act prohibits the distribution – defined by s. 1(p) to include "a trade in securities of an issuer that have not been previously issued" – by any person or company of a security without a receipted prospectus or an applicable exemption.

[22] Bennett, as admitted, illegally distributed ESSI securities. ESSI's common shares and debentures were clearly "securities" as defined by the Act and had not been previously issued. Bennett traded (directly and indirectly) in ESSI's securities without a prospectus and without any apparent attempt to ensure that prospectus exemptions were available to make such trades. This accords with Bennett's admission that ESSI investors "were not qualified" for the exemptions relied upon. Prospectus exemptions were largely unavailable in the circumstances, although some investors might have fortuitously qualified for such exemptions. As noted in *Re Cloutier*, 2014 ABASC 2 at para. 308: "It is insufficient to assume or hope that an exemption was available at the time of the trade or distribution of the security. Nor is it sufficient that some, but not others, of the trades within a distribution qualify for a claimed exemption".

[23] Accordingly, we find (consistent with the Statement) that Bennett contravened s. 110 of the Act.

B. Misrepresentations

[24] Section 92(4.1) of the Act prohibits the making of a misrepresentation (as that term is defined in s. 1(ii) of the Act). Specifically:

> No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> (i) is misleading or untrue, or
>
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security . . . .

[25] The materiality standard is an objective one, based on the perspective of a reasonable investor. Moreover, "[c]ommon-sense inferences about materiality may suffice" (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 764). The assessment involves:

> . . . a determination as to whether untrue or omitted facts would reasonably be expected to have a significant effect on the market price or value placed on securities by reasonable investors – a proxy for this is, essentially, determining whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked . . . . (*Re Arbour Energy Inc.*, at para. 765)

[26] Staff alleged that Bennett falsely represented to potential investors that ESSI owned patents and patents pending for ESSI's products and that ESSI had patents or patents pending on "Smart Crumbs" and "Aqua Fib[er]", two of ESSI's products that were "most heavily touted by Bennett".

[27] We accept that Bennett caused ESSI to represent to investors that it held patents and patents pending with respect to its products. Bennett admitted that three patents were registered in the name of WLB, two other patents were transferred from ESSI to WLB in February 2015, and ESSI held no patents as of March 2015. Accordingly, we find that these representations were either untrue or misleading by failing to accurately describe the actual ownership of the patents.

[28] We also accept that Bennett represented to potential investors that ESSI had patents or patents pending in relation to its "Smart Crumbs" and "Aqua Fiber" products, when in fact ESSI did not. Accordingly, we find that this representation was untrue.

[29] We are of the view that these representations were material and would reasonably have been expected to have a significant effect on the market price or value of ESSI securities. Bennett himself acknowledged that ESSI's patents were the company's "greatest asset", and he admitted that he knew or ought to have known that these misrepresentations would reasonably be expected to have a significant effect on the market price or value of ESSI's securities. We have no hesitation in concluding that there is a substantial likelihood that a reasonable investor would consider protection of intellectual property to be a critical factor in deciding whether to invest in the securities of an issuer in the position of ESSI.

[30] For these reasons, we find (consistent with the Statement) that Bennett contravened s. 92(4.1) of the Act.

C. Prohibited Representations

[31] Section 92(3)(b) of the Act prohibits a person or company from making certain representations in respect of a security without first obtaining written permission from the Executive Director. Without that permission, the person or company may not represent that "the security will be listed on any exchange" (unless the exchange "has granted approval to the listing or quoting of the security, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation"), or that an "application will be made to list the security on any exchange".

[32] Section 92(3)(b) was discussed in *Re Limelight Entertainment Inc.*, 2007 ABASC 710 (at para. 128):

> This prohibition is directed at unauthorized representations that might induce investment in securities based on the prospect, frequently baseless, of a liquid market in which to trade them and possibly an increased value. Evidence of the words "going public" being used can sustain a violation of section 92(3)(b) when accompanied by cogent contextual evidence, including clear evidence of the investor's understanding that the words "going public" meant being listed on an exchange (see *Re Maitland Capital Ltd.*, 2007 ABASC 357 at paras. 163-165).

[33] In *Re Smylski*, 2010 ABASC 320 (at para. 84), the panel said that the intent of this provision was "to protect investors by prohibiting representations that suggest an imminent liquidity event – a listing of securities on an exchange – which might be an attractive incentive to prospective investors."

[34] In the Interview, Bennett told Staff that he "promised" investors that he was going to take ESSI public and he wanted to use "the Toronto Exchange" so that he could "keep this a Canadian story". Bennett also acknowledged that his motivation to take ESSI public was to raise more capital and to provide an exit strategy for investors. Bennett's "promises" were made without written permission from the ASC's Executive Director, or the approval or consent of an exchange. Based on the evidence (including the Statement), we find that Bennett contravened s. 92(3)(b) of the Act.

D. Conduct Contrary to the Public Interest

[35] Staff alleged in the ANOH that Bennett's conduct was contrary to the public interest, and Bennett admitted that his breaches of the Act amounted to conduct contrary to the public interest.

[36] Having found, consistent with Staff's allegations and Bennett's admissions in the Statement, that Bennett breached ss. 110, 92(4.1) and 92(3)(b) of the Act, we do not consider it necessary to determine whether these contraventions were also contrary to the public interest.

IV. SANCTIONS AND COSTS ORDERS

A. Sanctions

[37] Having found that Bennett illegally distributed ESSI securities, and made misrepresentations and prohibited statements in respect of those securities, we now consider what sanctions should be imposed for those contraventions.

1. Parties' Submissions

[38] It was common ground that an appropriate sanction required some combination of market-access bans and an administrative penalty, that Bennett's recognition of the seriousness of his misconduct and his cooperation with Staff during the investigation were mitigating factors, and that Bennett's limited financial means was relevant to our assessment of the administrative penalty.

(a) Staff

[39] Staff sought 12-year market-access bans against Bennett, subject to any carve-outs "necessary to authorize any action by the trustee in bankruptcy as required by law", and an administrative penalty of $150,000.

[40] Staff characterized Bennett's misconduct as "significantly serious" and submitted that he poses a substantial risk to the capital market and should "not be trusted to make full and true statements to capital market participants". Staff submitted that Bennett "derived significant benefits" from his misconduct which warranted meaningful sanctions.

[41] Staff conceded that Bennett's recognition of the seriousness of his misconduct and his cooperation with ASC investigators were mitigating factors to be taken into account. Staff nevertheless suggested that his compliance efforts were, in essence, offset by other aggravating circumstances – he caused false exempt distribution reports to be filed with the ASC, he made false or misleading statements to Staff in the Interview, and he chose not to comply with Alberta securities laws despite having availed himself of legal advice. Staff also asserted that Bennett lacked remorse for his misconduct, and characterized his failure to transfer "what patents existed

into the name of ESSI" to "cure the material misrepresentations" as "both unethical and reprehensible". Staff submitted that this should be an aggravating factor for sanctioning purposes and reflected an increased need for specific deterrence.

[42] Staff accepted that a respondent's impecuniosity is a relevant sanctioning factor but argued that it does not preclude the imposition of a significant administrative penalty. Staff submitted that a $150,000 administrative penalty (reduced from what Staff maintained would otherwise be a proportionate and appropriate administrative penalty of $250,000) sufficiently accounts for Bennett's bankruptcy and delivers the necessary specific and general deterrence. Staff also said that a monetary sanction in this range would not be crushing on Bennett, since he will emerge from bankruptcy cleared of his debts while retaining certain exempt property and "can easily earn a substantial income to pay off this administrative penalty in a couple of years". Staff also noted that some ESSI investors have been forced to postpone their retirement due to Bennett's misconduct, implying that Bennett (who is now 70 years' old) should bear a similar expectation to satisfy any monetary orders.

[43] Staff tendered several impact statements prepared by ESSI investors. These statements were unsworn and their authors did not testify. With one exception, Bennett's counsel consented to these statements being entered into evidence. We accepted these statements as fairly presenting the authors' genuinely-held perspectives of their respective experiences with Bennett and ESSI. Staff submitted that these statements addressed the harm caused by Bennett's misconduct to the capital market generally and to ESSI investors specifically.

(b) Bennett

[44] Bennett admitted the "seriousness of what has happened" and that he deserved to be sanctioned, but submitted that his significant cooperation and inability to pay should result in a lesser sanction than what was sought by Staff. He was of the view that a $10,000 administrative penalty was appropriate, as part of a package of sanctions in which certain of the proposed market-access bans could be made permanent (specific reference was made to bans on the use of exemptions, advising in securities and acting as a registrant). Bennett questioned whether a trading ban was warranted, but requested that any such ban provide an exemption so that he could trade securities in registered accounts. He agreed that an exemption to enable "the trustee to discharge their duty" was appropriate.

[45] Bennett suggested that his cooperation was the sort that "you want to see from people alleged to have breached" the Act. He cited various steps that he had taken, including the retention of a local law firm and filing of ESSI's exempt distribution reports, the numerous admissions he made in the Interview, and the admissions in the Statement of "the facts underlying his breaches", as a demonstration of his "attempt at compliance". Bennett acknowledged that his cooperation was "perhaps not perfect" but submitted that his actions reflected a "recognition of a problem" which he sought to address. Bennett said that his intent was to protect ESSI investors, although he conceded that his actions may not have had that effect.

[46] Concerning his straitened circumstances, Bennett asserted that there is a "big difference between claimed impecuniosity and proof of bankruptcy". He submitted that the evidence

showed that he has marginal income and he will have considerable difficulty paying a significant administrative penalty. Despite his admission that he had received a substantial monthly income from ESSI for about two years, Bennett said that he has not received an enduring benefit and "we can safely determine that no benefit has been received" as he is bankrupt. He also said that his ability to pay is limited by his lack of high school or post-secondary education "or any meaningful training or certificates", and that ordering a bankrupt, retired, 70-year-old respondent to pay $150,000 would be "crushing and unfit" in the circumstances.

[47] Bennett contended that there was little need for specific deterrence, as his risk of reoffending is low based on his recognition of the seriousness of his misconduct.

2. The Law

[48] The ASC administers its sanctioning power under the Act in a manner that is protective and preventive, not punitive or remedial, with a view to safeguarding investors and fostering a fair and efficient capital market (*Re Homerun International Inc.*, 2016 ABASC 95 at para. 12, citing *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Sanctions must be "proportionate and reasonable" with specific deterrence (preventing future misconduct by a particular respondent) and general deterrence (preventing similar misconduct by others) being "legitimate considerations" (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154; *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62).

[49] In assessing sanctions, the following factors (discussed in *Homerun* at para. 20) are considered:

- the seriousness of the respondent's misconduct;
- the respondent's pertinent characteristics and history;
- any benefit sought or obtained by the respondent; and
- any mitigating or aggravating considerations.

[50] We discuss these factors in turn.

3. Analysis

(a) Seriousness of the Respondent's Misconduct

[51] Bennett's misconduct was serious. During a six-year period, he raised almost $4 million from ESSI investors in Alberta and Ontario, and there is no indication of a potential recovery of their investments. Bennett ignored his responsibility to make reasonable inquiries of prospective purchasers to ensure that they were qualified to invest in ESSI, thereby depriving investors of important protections provided by Alberta securities laws.

[52] Bennett knowingly made false or misleading statements to prospective investors relating to ESSI's purported intellectual property, which led investors to make ill-informed investment decisions without the ability to properly assess the risks involved. He also promised prospective investors that ESSI would be listed on an exchange, which gave investors a false hope of

imminent liquidity. We agree with the panel's comments in *Re Campbell*, 2015 ABASC 750 at para. 24, that "a prohibited representation and misrepresentations by their very nature undermine confidence in the integrity of the capital market".

(b) The Respondent's Characteristics and History

[53] Bennett has not previously been sanctioned by the ASC, nor was he registered in any capacity with the ASC during the relevant time. In some circumstances, these facts might moderate the need for specific deterrence. However, we consider the making of misrepresentations and prohibited representations while soliciting investments to be self-evidently wrong. Accordingly, we do not consider Bennett's lack of registration or the absence of previous sanctions to be mitigating in the circumstances.

[54] It was common ground that Bennett's current financial condition is a factor to take into account in assessing sanctions against him. We adopt here the proportionality assessment discussed in *Homerun* at paras. 17-18:

> Panels may be faced with assessing the proportionality of contemplated sanctions against a respondent claiming impecuniosity, or at least a constrained ability to satisfy any monetary order. In this regard, we note the statements in *Walton* that an administrative penalty "beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial condition" (at para. 165) and that the amount of an administrative penalty should not be "determined after overemphasizing the requirement of general deterrence, without having sufficient regard to the individual circumstances" (at para. 166).
>
> We do not understand these statements to preclude consideration of general deterrence in assessing either the need for, or the appropriate extent of, an administrative penalty against an individual respondent. Rather, this was an admonition not to focus exclusively, or excessively, on general deterrence. The Court of Appeal explained this, and the danger to be avoided, as follows (*Walton* at para. 156): "An administrative penalty [focused] purely on general deterrence of an unidentified and amorphous sector of the public could easily become disproportionate to the circumstances of the individual involved". We are mindful, however, that a monetary sanction almost inevitably involves (and indeed that a sanction of any type might impose) a burden on a respondent. This does not in itself demonstrate disproportion or unreasonableness in the *Walton* sense; an order with no real effect on the recipient may be no sanction at all.

[55] We accept that Bennett is impecunious and find that he has limited ability to satisfy a significant monetary sanction. We understand that he will be discharged from bankruptcy (if he satisfies certain conditions) and will presumably retain certain exempt assets and be relieved of certain debts. Even so, he is currently retired and seemingly relies on a government pension and veteran's medical benefits as his primary source of income (aside from some possible seasonal, snow-clearing work).

[56] This finding does not preclude the imposition of an administrative penalty in conjunction with market-access bans. In assessing the amount of administrative penalty we are mindful that we not overemphasize general deterrence nor overlook Bennett's individual circumstances.

(c) Benefit Sought or Obtained by the Respondent

[57] Having received a salary from ESSI over a two-year period when the company was not generating significant revenues and was being kept "afloat" from investors' capital, Bennett gained a financial benefit from his misconduct.

[58] Bennett submitted that he has not received an enduring benefit, largely as a result of his bankruptcy. However, it is clear that Bennett acted with the intention that he would benefit financially from his misconduct. On the eve of his resignation as ESSI's director, he caused the company to retain him as an employee and to provide him with a healthy salary (along with potential bonuses and stock options). In subsequent bankruptcy proceedings, Bennett claimed ownership to several patents, including the two patents transferred to WLB from ESSI in February 2015 for nominal consideration. ESSI's claim to these patents has since been disallowed by the bankruptcy trustee, whose decision was upheld on appeal. According to Bennett's counsel, any excess value from the sale of the patents in the bankruptcy proceedings would, in theory, benefit Bennett. While we agree with Bennett's submission that there is insufficient evidence that he will receive an ESSI-related benefit from the bankruptcy, we are satisfied that he intended to financially benefit from his misconduct. Accordingly, we find there is a need for specific deterrence in the circumstances.

(d) Mitigating or Aggravating Considerations

[59] Bennett's cooperation with Staff merits some recognition as a mitigating factor. The subject of a respondent's cooperation as a mitigating consideration was discussed by the panel in *Homerun* at para. 44:

> Cooperation with Staff in the investigation or hearing is generally more relevant to the issue of cost-recovery orders (discussed below) than to sanctioning, but in some circumstances it may reinforce a mitigating consideration (for example, appreciation of wrongdoing and acceptance of responsibility for it). Cooperation with Staff might even amount to mitigation in its own right (perhaps, for example, where such cooperation assists Staff in detecting and curtailing ongoing misconduct by others).

[60] Because his admissions in the Statement avoided the need for an extended, contested hearing on the merits of Staff's allegations, Bennett's cooperation reduced the amount that otherwise would have been sought by Staff in a cost-recovery order.

[61] We also accept that Bennett genuinely recognizes the seriousness of, and his responsibility for, his misconduct. He retained legal counsel to assist with ESSI's compliance, attended the Interview, provided timely undertaking responses to Staff, and signed the Statement in which he provided comprehensive admissions of Staff's allegations. These steps, as well as his voluntary resignation as a director and officer of ESSI, reflect an appreciation by Bennett that his conduct was wrong and that he bears responsibility for his actions. On its face, Bennett's recognition of the seriousness of his misconduct suggests a diminished need for specific deterrence.

[62] However, other relevant facts dictate a diminished degree of moderation that we would otherwise be prepared to recognize. Of particular concern is the filing of inaccurate exempt distribution reports, which Bennett authorized without any apparent consideration for the

availability of the claimed exemptions. As previously noted by the ASC, the filing requirement is not a mere technicality, for "abuses of the exempt market's safeguards can be as damaging as abuses of the exemptions themselves" (*Re Robinson*, 2013 ABASC 317 at para. 21). In our view, the filing of inaccurate reports compounded Bennett's misconduct alleged in the ANOH by impairing the ASC's ability to monitor the exempt market and by giving the misleading impression that ESSI's distributions were compliant with Alberta securities laws.

[63] We also consider here Bennett's transfer of ESSI patents to WLB for nominal value, and the fact that he maintained ownership of these (and other) patents in his bankruptcy claim. Despite his assertion that he was motivated to protect ESSI investors (and his statement to Staff in the Interview that he would return the patents to ESSI at an appropriate time), ESSI was ultimately deprived of these assets when Bennett claimed them as his own in the bankruptcy proceeding. Whether we consider Bennett's retention of the patents as an aggravating factor, or as further attenuating the mitigating effect of his cooperation with the ASC, his actions demonstrate a need for specific deterrence.

[64] While Bennett should receive some credit for his cooperation with Staff, his conduct fell short of the cooperation expected from a respondent who has fully accepted responsibility for contravening Alberta securities laws. It is therefore appropriate to place more emphasis on specifically deterring Bennett from future misconduct than was suggested by his counsel.

4. Conclusion on Sanctions

[65] Consistent with the parties' submissions, we consider that a combination of market-access bans and an administrative penalty are necessary to deliver the requisite specific and general deterrence required.

[66] Staff pointed to four prior ASC decisions as guidance for the appropriate sanction: *Re Chmelyk*, 2017 ABASC 109, *Re Global Social Capital Partners, Inc.*, 2016 ABASC 97, *Campbell* and *Robinson*. We also considered *Re 2 Wongs Make It Right Enterprises Ltd.*, 2014 ABASC 475, in which the respondents had raised almost $5 million. There, the individual respondents had cooperated with Staff's investigation and admitted their misconduct (both illegally traded and distributed securities, while one also acted as an unregistered adviser, made misrepresentations and engaged in fraudulent conduct), were "genuinely contrite" and submitted statutory declarations in support of their claims of impecuniosity. The panel ordered 10-year market-access bans plus monetary sanctions of $35,000 and $15,000.

[67] In light of the seriousness of Bennett's misconduct and the harm done to investors, along with the apparent ease with which he was able to raise capital while having little or no regard for Alberta securities laws, we conclude that the public interest requires permanent market-access bans. Even though the duration of Staff's proposed market-access bans would preclude Bennett from accessing the capital market until he is well into his eighties, the need to deter Bennett from that privilege, as well as others who might wish to engage in similar misconduct, warrants orders of permanent duration. Nonetheless, we do not believe that it would be contrary to the public interest to permit Bennett the limited ability to trade (through a registrant) in registered accounts, having regard to the duration of his trading ban.

[68] Staff also suggested an exemption to Bennett's market-access bans "to authorize any action by the trustee in bankruptcy as required by law". Given the lack of clarity on the terms of this proposed order, we are not prepared to modify the market-access bans. However, a party may in future apply for a variation of the market-access bans, provided the proposed order is not prejudicial to the public interest.

[69] Staff submitted that an administrative penalty of $250,000 was appropriate in the circumstance before any reduction to account for proportionality and mitigating circumstances – we view that as excessive. On the other hand, Bennett's suggestion of a $10,000 administrative penalty is clearly inadequate, given the seriousness of his misconduct. After taking into account Bennett's current financial state, the nature of the misconduct and the harm caused to investors, prior decisions involving similar contraventions, and the need for specific and general deterrence and proportionality, we order in the public interest that he pay an administrative penalty of $50,000.

B. Costs

1. The Law

[70] Section 202 of the Act authorizes a hearing panel, once satisfied that a respondent has contravened Alberta securities laws, to order the respondent to pay "costs of or related to the hearing or the investigation that led to the hearing, or both". Section 20 of the *Alberta Securities Commission Rules (General)* sets out categories of costs that may be subject to an order if the hearing panel "is satisfied that such costs are reasonable in all the circumstances".

[71] A costs order issued pursuant to s. 202 is not a sanction, and its purpose was described in *Re Marcotte*, 2011 ABASC 287 (at para. 20):

> A costs order is . . . a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

[72] As noted in *Homerun* (para. 49), it would not be appropriate to assess costs attributable to withdrawn or dismissed allegations. The panel in *Homerun* (at para. 52) also stated that a relevant factor to the cost-recovery analysis is "the efficiency (or inefficiency) that each party brought to the proceeding as a whole, and the associated contribution to the broader public interest objectives of our regulatory system".

2. Analysis

[73] Staff's statement of investigation and hearing costs, along with supporting documentation, reflected overall costs of $60,685.08. Bennett took no issue with these amounts, and we consider Staff's figures to be reasonable.

[74] Staff sought a cost-recovery order that reflected a discount of about 50% from their actual costs, which Staff submitted would sufficiently account for Bennett's cooperation with Staff investigators, his acknowledgement of the seriousness of his misconduct by entering into the

Statement, and Staff's costs in relation to the (subsequently dropped) allegations against ESSI. Bennett submitted that a 75% reduction of the costs was appropriate in the circumstances.

[75] Bennett made a meaningful contribution to the efficiency of the investigation and conduct of the hearing. He attended the Interview and gave significant admissions, followed by timely undertaking responses to certain unanswered questions. He signed the Statement, did not dispute the need for sanctions (consisting of both permanent market-access bans and a modest administrative penalty) and did not challenge the investor statements (with one exception, where we ruled in Bennett's favour). In the circumstances, we consider a cost-recovery order of $30,000 of the investigation and hearing costs to be appropriate, and we so order.

V. CONCLUSION

[76] For the reasons given, we order against Bennett that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- with permanent effect:

    - under ss. 198(1)(b) and (c), he must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him, except that these orders do not preclude Bennett from trading in or purchasing securities or derivatives through a registrant (who has first been given a copy of this decision and the Agreed Statement of Facts and Admissions) in one registered retirement savings plan, one registered retirement income fund, one tax-free savings account (as defined in the *Income Tax Act* (Canada)) and one locked-in retirement account, each for the benefit of one or more of him and his spouse;

    - under ss. 198(1)(c.1), (e.1), (e.2) and (e.3) of the Act, he is prohibited from engaging in investor relations activities, from advising in securities or derivatives, from becoming or acting as a registrant, investment fund manager or promoter, and from acting in a management or consultative capacity in connection with activities in the securities market;

    - under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- under s. 199, he must pay an administrative penalty of $50,000; and

- under s. 202, he must pay $30,000 of the costs of the investigation and hearing.

November 22, 2017

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kate Chisholm, QC

"original signed by"
Webster Macdonald, QC