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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the Act)**

– AND –

IN THE MATTER OF THE APPLICATION OF LYNDON HIBBERT PURSUANT TO SECTION 151 OF THE ACT

REASONS FOR DECISION

Hearing	September 29, 2021	
Reasons	October 26, 2021	
Panel	Valerie Seager	Chair
	Michael Deturbide	Commissioner
	Natalie MacDonald	Commissioner
Submissions	Jennie Pick	Counsel for the Director of Enforcement of the Nova Scotia Securities Commission
	Lyndon Hibbert	For himself

I. BACKGROUND

[1] Mr. Hibbert applied pursuant to section 151 of the Act to revoke or vary portions of the Commission's Order dated November 27, 2013 (2013 Order) based on the passage of time and a change in personal circumstances.

[2] The 2013 Order resulted from the Commission's approval of a settlement agreement between Mr. Hibbert and the Commission (Settlement). In the Settlement Mr. Hibbert and HWL Healthy Wealthy Living Inc. (HWL), a company of which Mr. Hibbert was the director and president, admitted to breaches of section 31(1)(a) of the Act (trading in securities without being registered to do so) and section 58(1) of the Act (distributing securities of HWL without first having been issued a receipt for a preliminary prospectus or prospectus by the Commission). The breaches related to the solicitation, distribution and trading of approximately $191,000 in investments in HWL to 10 Nova Scotia and four Ontario residents.

[3] The Settlement referenced several mitigating factors regarding Mr. Hibbert's conduct including:

(a) Mr. Hibbert acknowledged and accepted responsibility for his conduct, was extremely remorseful and regretted his actions and fully cooperated with the investigation of the matter;

(b) At all relevant times Mr. Hibbert was not aware his actions were in violation of Nova Scotia securities laws;

(c) At all relevant times Mr. Hibbert relied on assurances provided by his brother as to the legality and viability of the transactions and on the basis of those assurances Mr. Hibbert believed the actions in question were legal and legitimate; and

(d) Mr. Hibbert made no commissions and did not profit from the investments in HWL.

[4] The 2013 Order included a number of sanctions against Mr. Hibbert and HWL. Mr. Hibbert now seeks to have the following sanctions revoked and/or varied:

(a) Pursuant to section 134(1)(d)(ii) of the Act, the Respondent Hibbert be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager permanently;

(b) Pursuant to section 134(1)(g) of the Act the Respondent Hibbert be prohibited from becoming or acting as a registrant, investment manager or promoter permanently;

(items (a) and (b) collectively being the "Permanent Orders"); and

(c) pursuant to section 135(a) and (b) of the Act the Respondent Hibbert pay an administrative penalty in the amount of $20,000 (Penalty Order).

[5] Mr. Hibbert and the Director provided written submissions regarding Mr. Hibbert's application. A one-day hearing was held on September 29, 2021 (Hearing) before a three-person panel (the Panel). Mr. Hibbert represented himself, and had three witnesses testify on his behalf. All of the materials submitted by Mr. Hibbert and the Director in advance of the Hearing were accepted as exhibits.

[6] On September 30, 2021 the Panel issued an order agreeing to the revocation of the Permanent Orders, with reasons to follow. These are those reasons.

II. ISSUE TO BE CONSIDERED

Mr. Hibbert seeks to revoke the Permanent Orders and vary the Penalty Order. The issue for the Commission to consider is whether the requested revocation and variation would be prejudicial to the public interest.

III. POSITIONS OF THE PARTIES

A. APPLICANT

[7] Information regarding Mr. Hibbert and the Application was provided by Mr. Hibbert's written submissions, his oral testimony and the testimony of his witnesses.

[8] Since the 2013 Order was issued, Mr. Hibbert has consistently engaged in community-minded employment and volunteer activities, primarily involving youth in need. He has worked as a child and youth worker, an education program assistant, a community outreach worker and a residential counselor. He has worked extensively with the Black community on various issues involving social development matters, including working as a social advocate and social and spiritual counselor with Black inmates and parolees, and has been involved with various Black Educators Association programs. He is a program advisor and director of The Bold, a not-for-profit organization where he works with a team to identify, develop and implement programs that address homelessness, racial inequality, financial literacy and anti-racism. He is currently employed as a child and youth worker with the Toronto District School Board.

[9] Mr. Hibbert is now seeking to become a life insurance agent. His motivation for doing so is to better educate individuals about the need for proper protection of their wealth for the purpose of securing an adequate financial future for their family and community. He has completed the Life License Qualification program at Durham College as well as most of the other requirements necessary to obtain an insurance agent license in Ontario. The Permanent Order does not prohibit Mr. Hibbert from acting as an insurance agent and he advised the Panel he does not intend to deal in securities. However, Mr. Hibbert asserted that the financial services company for whom he intends to work has denied the sponsorship of his

insurance agent license because of the 2013 Order, based on the seriousness of the order and the resulting character implications. Mr. Hibbert advised the Panel of his belief that revocation of the Permanent Orders would allow the financial services company to proceed with his sponsorship and enable him to fulfil the requirements necessary to obtain his insurance agent license.

[10] Mr. Hibbert acknowledged that his ignorance in not knowing and not seeking to know the regulations that governed his activities that were the subject of the 2013 Order put the public at risk. Mr. Hibbert is remorseful and regrets his actions leading to the 2013 Order. As the Settlement made clear and as Mr. Hibbert acknowledged in his testimony, his actions which gave rise to the 2013 Order were the result of ignorance and failure to inform himself as to the applicable law, and were not the result of an intent to deceive or violate the law. He advised the Panel that he accepts that he was fully responsible for his actions but he has learned from the experience and has made the necessary corrections in his life to ensure he does not act out of ignorance pertaining to regulatory or business matters. He is now meticulous in ensuring he is knowledgeable and has the correct information before proceeding on regulatory and business matters and he does not rely on the assurance of others.

[11] Mr. Hibbert referenced his recent education regarding the life insurance business, including courses related to ethics and compliance. He advised the Panel that he has gained knowledge of the financial industry, including regulations and procedures, and has the wisdom and resources to now obtain knowledge of the environment that he is operating in before acting upon a venture.

[12] In his submissions Mr. Hibbert provided several character reference letters. Some were prepared in connection with the Application, while some were related to employment. Mr. Hibbert asked three witnesses who provided reference letters to support the Application to testify.

[13] Mr. Sheldon Grant is a financial services representative with a financial organization and he has personally worked with and trained Mr. Hibbert during his pursuit of his insurance license. Mr. Grant made it clear he was testifying in his personal capacity and his views and opinions were his own and not those of his employer. Mr. Grant would be Mr. Hibbert's direct supervisor should his sponsorship be agreed to. Mr. Grant spoke highly of Mr. Hibbert's work ethic, honesty and commitment to community and family. He testified that he would not provide character evidence for just anyone, but stated that if there is anyone that deserves a second chance, regardless of past mistakes, it is Mr. Hibbert. Mr. Grant was aware of the Settlement and the terms of the 2013 Order.

[14] Ms. Angelina Quashie has known Mr. Hibbert since 2015 and has worked closely with him on political campaigns and community outreach programs. She spoke of Mr. Hibbert's integrity and described him as a man of respect, honour and compassion who says what they mean and means what they say.

[15] Ms. Carol Royer is the Executive Director of the Bold Agenda Initiative, a not-for-profit organization where Mr. Hibbert volunteers and serves on the board. Ms. Royer spoke highly of Mr. Hibbert's work with her organization, including his work with vulnerable individuals, and described him as trustworthy and committed. She was generally aware of Mr. Hibbert's history with the Commission when she provided her reference letter.

[16] As part of his Application Mr. Hibbert requested that the Penalty Order be considered paid in full based on the payments that have been made to date. The Penalty Order was for $20,000 (the 2013 Order also required the payment of $1,000 in costs). To date, Mr. Hibbert has paid the Commission $6,800, representing the $1,000 cost amount and $5,800 of the $20,000 administrative penalty, based on an instalment arrangement agreed to with the Commission. He has provided the Commission with post-dated cheques for future payments up to February, 2023. He confirmed that his principal motivation in requesting the Penalty Order be revoked is to ensure that the outstanding penalty is not an obstacle to obtaining sponsorship of his life insurance agent license and does not interfere with the revocation of the Permanent Orders, should that request be granted. In other words, if revocation of the Permanent Orders is granted but is conditional on full payment of the Penalty Order, Mr. Hibbert believes that would prevent him from achieving his sponsorship goal.

[17] Mr. Hibbert submits that based on the amount of time that has passed since the 2013 Order was issued, his conduct and the experience and knowledge gained by him since then and the testimony of his character witnesses, it would not be prejudicial to the public interest to grant the variations requested by him.

B. THE DIRECTOR

[18] In her written submission, the Director indicated she did not necessarily oppose Mr. Hibbert's request to revoke the Permanent Orders, subject to receiving Mr. Hibbert's oral testimony and that of his witnesses at the Hearing. The Director opposed Mr. Hibbert's requests to vary the Penalty Order.

[19] In her written materials the Director submitted that a number of factors weighed in favour of Mr. Hibbert's request to revoke the Permanent Orders. These included:

(a) almost eight years have elapsed since the 2013 Order was issued, a significant period of time over which to assess Mr. Hibbert's conduct;

(b) Mr. Hibbert's conduct, as illustrated by his consistent employment and volunteer history engaging with the community and vulnerable individuals, indicates trustworthiness;

(c) Mr. Hibbert provided evidence of his trustworthiness from several references which are on the whole glowing, including one from Mr. Grant indicating Mr. Hibbert has impeccable character and that he is well-liked and respected in his business and community;

(d) Mr. Hibbert expressed remorse and accepted responsibility for his actions, indicating it is unlikely he will commit securities laws misconduct in the future. Mr. Hibbert's original misconduct was not intentional nor did it amount to fraud – his violations were registration and prospectus related;

(e) Mr. Hibbert consistently adhered to the terms of a payment plan entered into with Enforcement Staff to satisfy the Penalty Order and has cooperated with and behaved positively with Staff; and

(f) to act as a registrant, investment fund manager, promoter or director or officer of same (the conduct prohibited under the Permanent Orders), Mr. Hibbert will be subject to safeguards including registration requirements, scrutiny of any prospectus applications and continuous disclosure obligations.

[20] Following Mr. Hibbert's testimony at the Hearing and that of his witnesses, including testimony on cross-examination, the Director confirmed that she did not oppose the revocation of the Permanent Orders. The Director continued to oppose any variance of the Penalty Order that would reduce the amount of the administrative penalty.

[21] The Director submitted that the Penalty Order serves a different purpose than the Permanent Orders, a purpose which would be undermined if the amount of the penalty is reduced. The Permanent Orders serve a tailored specific deterrence by removing Mr. Hibbert from participation in certain roles in the securities industry. The Penalty Order is principally focused on general deterrence. Reducing the Penalty Order would undermine the deterrent effect for which it was imposed vis-a-vis similar misconduct by others in the future.

[22] The Director submitted that a request to vary the Penalty Order is in effect an out-of-time appeal of the 2013 Order. The penalty that was imposed was a lump sum which has not been enforced in whole only because Staff have permitted Mr. Hibbert to satisfy the penalty over time, recognizing the significance of such an award for an individual to pay. Amending the amount of the penalty now, eight years after the fact, would create an incentive for respondents not to pay penalty amounts, or to create payment plans even where they are not necessary, to hedge against the possibility of having the amount amended on application sometime in the future. It may also create a disincentive for the Commission to agree to payment plans. The Director submitted that the penalty portion of the 2013 Order has run its course and cannot now be varied.

IV. LAW AND ANALYSIS

A. Law

[23] Section 151 of the Act provides that "the Commission may, where in […] its opinion to do so would not be prejudicial to the public interest, make an order on such

terms and conditions as may be imposed revoking or varying any decisions made under this Act or the regulations".

[24] The Commission has not released a written decision under section 151 of the Act. However, the legislation of other jurisdictions contains similar language. In *Andrew Rankin*, 2011 ONSEC 32 (CanLII) (***Rankin***), affirmed in *Rankin v. Ontario Securities Commission*, 2013 ONSC 837 (CanLII), the Ontario Securities Commission (OSC) noted that the discretionary power contained in section 144 of the Ontario *Securities Act*, which is similar to section 151 of the Act, must be exercised for "appropriate regulatory purposes" (at para. 60) as reflected in the applicable securities legislation. Accordingly, determination of the public interest in section 151 of the Act must be grounded in the purpose of the Act as set out in section 1A: to "provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets and, where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation".

[25] There are few applications similar in nature to the Application. The leading authority appears to be *Orsini, Re* (1997), 20 OSCB 6068 (*Orsini*) in which an individual subject to a 25-year ban on using exemptions under the Ontario *Securities Act* sought to have the ban revoked eight years after it was imposed. The OSC stated that "it is the conduct of the applicant since 1991 and the quality of the efforts he has made to rehabilitate himself and to purge himself of his guilt which are most relevant in an application such as this". The OSC then identified six criteria by which an application such as the Application should be assessed, based on criteria articulated in *Re Weisman*, Report to Convocation of the Law Society of Upper Canada dated January 27, 1997, which dealt with applications for readmission to a law society. These criteria are:

(a) As a general rule, an order such as the 1991 OSC order is intended to run its course. Varying or rescinding the order should be the exception rather than the rule.
(b) The applicant must show by a sufficient course of conduct he is a person to be trusted.
(c) The applicant must show that his conduct is unimpeached and unimpeachable which can best be established by evidence of trustworthy persons, especially persons with whom the applicant has been associated since the 1991 OSC Order.
(d) A sufficient period of time must have elapsed before an application for readmission will be granted.
(e) The applicant must show by substantial and satisfactory evidence that it is highly unlikely that the applicant will misconduct himself in future if the applicable order is revoked or rescinded.
(f) The applicant must show that his or her past conduct has been entirely purged.

[26] In *Orsini*, the OSC declined to grant the application due to insufficient third party corroborative evidence as to the applicant's conduct and a lack of compelling evidence that the applicant purged the serious misconduct that resulted in the original order.

[27] The *Orsini* criteria were subsequently considered by the OSC in *Friesen, Re* (1999), 22 OSCB 2427 (OSC) *(Friesen).* The applicant in *Friesen* sought to amend or revoke an OSC order forbidding him from selling securities to the public or engaging in the securities business. In that case, the OSC cited the Orsini criteria and determined, based on the evidence before it, including evidence from knowledgeable witnesses, that the applicant was trustworthy, that the applicant had established that he was a person to be trusted, that sufficient period of time had elapsed since the original order (10 years) and that it was unlikely that the prohibited conduct would be repeated should the requested order be granted. The OSC described the Orsini criteria as follows:

> It seems to us that criteria 2, 3, 5 and 6 can be summed up as follows, as applicable to cases of this sort. The applicant for a section 144 order in these circumstances must be able to convince the panel, by substantial and satisfactory evidence (including the evidence of trustworthy persons, especially persons with whom the applicant has been associated since the making of the order sought to be revoked or varied) that (a) the sanctions imposed on him or her in the original order are no longer necessary to protect investors and the marketplace because the applicant is a "changed person", having, in the period since the making of the order, completely rehabilitated himself or herself (or, to put it another way, "purged his or her past conduct") and (b) his or her conduct since the time of the making of the original order shows that he or she can now be trusted not to engage in securities activities which are contrary to the public interest. This is, no doubt, a difficult test to meet, but not an impossible one, which, in our view, in another way of stating criterion 1.

[28] In our view, notwithstanding that Mr. Hibbert has a difficult test to meet, he has met that test and satisfied the criteria set out in *Orsini*. The 2013 Order was issued eight years ago. Since then, Mr. Hibbert has been engaged continuously in employment and voluntary activities directed towards helping the disadvantaged and vulnerable persons, and has established by those activities that he is a person to be trusted. He has received glowing references, both general ones in connection with his employment and specific ones provided in the context of the Application. Mr. Hibbert's three witnesses were forthright as to their positive views of Mr. Hibbert's trustworthiness, character and honesty. Mr. Hibbert is remorseful of his past conduct, aware of the circumstances that led to his transgressions and has identified personal strategies to ensure a similar situation does not recur. He has made continuous efforts to repay the administrative penalties and cooperated fully with Staff in that regard. He has established that he is unlikely to misconduct himself in the future if the Permanent Orders are revoked and the quality of his rehabilitation efforts illustrate that his past conduct has been purged. We are of

the view that it is not prejudicial to the public interest to revoke the Permanent Orders.

[29] With respect to the Penalty Order, the Commission has previously noted the distinction between sanctions focused on conduct and administrative penalties. In *In the Matter of Quintin Earl Sponagle and Trevor Wayne Hill* NSSEC, 4 August 2011) *(Sponagle)* the panel in that matter stated the following (at paras. 107-108):

> In our view, the nature of the administrative orders and prohibitions that the Commission is empowered to impose pursuant to section 134 of the Securities Act differ from the monetary administrative penalties that may be imposed pursuant to section 135. Administrative orders under section 134 are inherently preventative in nature. Though they may be based on past conduct, their application is clearly protective of the public interest in the future. While such administrative orders can be exceptionally serious and disabling to those upon whom they are imposed, their object is to protect the public by ensuring compliance with the Securities Act and by removing from the capital markets those who, in the view of the Commission, pose threats to its integrity.
>
> Monetary administrative penalties are imposed for different reasons. They are intended to deter future misconduct by the person against whom they are ordered, as well as by others who would consider similar activity, by penalizing those who have breached the Act. The deterrent effect is achieved by removing any financial incentive to breach the Act and also by imposing additional penalties sufficient to cause an apprehension in any person considering a breach of the Act in the future that they too will suffer a similar penalty if they proceed with such activity.

[30] The analysis in *Sponagle* was made in the context of determining whether the then-current administrative penalty provisions should apply retroactively to the respondents' conduct, notwithstanding that the maximum administrative penalty at the time the conduct occurred was significantly lower.

[31] The Director referred to *Rankin* for the proposition that the power to revoke or vary cannot be exercised if the application is, in effect, an appeal and in particular referenced a case referred to in *Rankin*, *X Inc., Re* (2010), 33 O.S.C.B 11380 (*X Inc*.). However, *X Inc*. involved an application by OSC Enforcement Staff to vary a decision made by a hearing panel. As the *Rankin* panel stated (at para. 66):

> The Commission concluded in Re *X* that Staff was attempting to use section 144 as a means to appeal the decision of a Commission panel. Staff does not have a right of appeal under the Act. As a result, the Commission refused to permit Staff's application under section 144. The Application is not being made by Staff and is not made in circumstances comparable to those in *Re X*.

[32] It is not clear why an application to revoke or vary an administrative penalty decision should be considered an appeal but an application to revoke or vary a sanctions decision should not. Section 151 of the Act allows the Commission to revoke or vary any decision made under the Act if in its opinion to do so would not be prejudicial to the public interest. Section 151 does not distinguish between decisions relating to sanctions and decisions relating to administrative penalties. In all cases, the test is whether it would not be prejudicial to the public interest to revoke or vary the decision.

[33] There may be a variety of circumstances and situations giving rise to an application under section 151. For that reason, it is difficult to state a particular set of principles that will apply in all circumstances. However, we agree with the proposition, articulated in *Rankin*, that it is generally not in the public interest to re-open settlements previously entered into and approved or to revoke administrative sanctions previously imposed and that a revocation or variation of a Commission decision should only be done in unusual or rare circumstances. The onus is on the applicant to show that the revocation or variation is justified and not prejudicial to the public interest.

[34] In our view, while Mr. Hibbert has established that it is not contrary to the public interest to revoke the Permanent Orders, he has not done so with respect to the Penalty Order. Administrative penalties serve a general deterrent purpose that should not be lightly interfered with. They are imposed based on the nature of and seriousness of the conduct in question, not on individual circumstances. We agree with the Director that, except in rare circumstances, reducing the Penalty Order would undermine the deterrent effect for which it was imposed vis-a-vis similar misconduct by others in the future.

[35] Typically, administrative penalties are required to be paid in full within a short period of time after their imposition. While we have not received submissions on the matter, we suspect that the Commission does not have the power to order the reimbursement of an administrative penalty that has been paid in full. The decision to allow an administrative penalty to be paid in instalments is solely at the Director's discretion. In appropriate cases exercise of that discretion benefits both the respondent and the Commission – by ensuring penalties are collected in full while accommodating financially challenged respondents. However, the exercise of that discretion should not subsequently disadvantage the Director in future Section 151 applications - in that an administrative penalty paid in instalments could be subject to variation but one paid in full could not.

[36] Mr. Hibbert was candid in admitting that his principal purpose in requesting variation of the Penalty Order was to ensure that the outstanding balance under that order, which he continues to pay down by instalment on a regular basis, not interfere with revocation of the Permanent Orders, were that revocation to be granted. That would be the case where, for example, the revocation of the Permanent Orders was conditional on payment in full of the Penalty Order. We do

not impose any such condition on our decision to revoke the Permanent Orders, which took effect upon issuance of our order.

[37] There may well be circumstances where a variation of an administrative penalty order is justified and found to be not prejudicial to the public interest. However, in these circumstances we do not find that to be the case and we decline to vary the Penalty Order.

V. CONCLUSION

[38] As set out in the Panel's order dated September 29, 2021:

(a) paragraph 4 of the 2013 Order is revoked and Mr. Hibbert is not prohibited from becoming or acting as a director of officer of any issuer, registrant or investment fund manager; and

(b) Paragraph 5 of the 2013 Order is revoked and Mr. Hibbert is not prohibited from becoming or acting as a registrant, investment fund manager or promoter.

DATED at Halifax, Nova Scotia, this 26th day of October, 2021.

NOVA SCOTIA SECURITIES COMMISSION

(signed) *"Valerie Seager"*
Valerie Seager
Chair

(signed) *"Michael Deturbide"*
Michael Deturbide
Commissioner

(signed) *"Natalie MacDonald"*
Natalie MacDonald
Commissioner