Regulating Market Manipulation and Investment Fraud: A Call for More Stringent Criminal Sanctions

VICKY LIU*

ABSTRACT

There are various ways to manipulate the market and devise fraudulent investment schemes. Common methods of market manipulation include front running, insider trading, pump and dump, wash trading, pre-arranged trading, and spoofing. Ponzi schemes and pyramid schemes are also prevalent investment fraud schemes. Market manipulation and investment fraud may be addressed through three main avenues: administrative proceedings, quasi-criminal proceedings under securities legislation, and criminal law proceedings under the federal *Criminal Code*. A number of cases demonstrate that administrative sanctions are limited in their effects, while quasi-criminal and criminal sanctions seem to have been disproportionately lenient, even for large-scale, inter-jurisdictional, and multimillion-dollar fraud schemes. Lenient sanctions pose serious problems, such as the unlikelihood to sufficiently serve as specific or general deterrence, the breach of investor and public confidence in the

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financial markets, and, ultimately, the failure to fulfill the purpose of securities regulation. I argue that it is necessary to ensure stronger inter-jurisdictional and cross-jurisdictional cooperation between securities regulators of different jurisdictions, introduce better detection systems to respond to more technologically advanced methods of market manipulation and investment fraud, and, ultimately, impose harsher criminal sanctions, including lengthier imprisonment terms and heavier monetary penalties.

I. INTRODUCTION

> "[M]arket manipulation is a very serious breach of the Act. … Market manipulation strikes at the foundations of securities regulation, undermining the integrity of the capital markets and destroying investor confidence."[1]
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> *Application 20220610 (Re)*

> "[T]he purpose of securities legislation includes three goals: protection of the investing public, which is the primary goal; capital market efficiency; and ensuring public confidence in the system."[2]
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> *Party A v British Columbia (Securities Commission)*

In 2009, Gary Sorenson and Milowe Brost were sentenced to 12 years in prison by the Calgary Court of Queen's Bench for operating the largest Ponzi scheme in Canadian history over a nine-year period.[3] The two former business partners had earlier been found guilty of theft and fraud in a Calgary courtroom after a five-month jury trial. They promised the investors an inflated and highly unrealistic return, and their Ponzi scheme defrauded more than 2,000 investors around the world of an amount estimated to

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1 *Application 20220610 (Re)*, 2023 LNBCSC 225 at para 57.

2 *Party A v British Columbia (Securities Commission)*, [2021] BCJ No 2096 at para 116.

3 "Gary Sorenson and Milowe Brost get 12 years in prison for Ponzi Scheme" (28 July 2015), online: *CBC News* <www.cbc.ca/news/canada/calgary/gary-sorenson-and-milowe-brost-get-12-years-in-prison-for-ponzi-scheme-1.3170551> [perma.cc/5HKE-LPBL] [Gary Sorenson]. See also *R v Breitkreutz*, 2022 ABQB 559 at para 47 [*Breitkreutz*].

be over $100 million and up to $400 million.[4] The court received nearly 600 victim impact statements prior to the sentencing hearing. At the sentencing hearing, the Crown requested a 14-year prison term for the pair, which is the maximum sentence allowed for a fraud conviction.[5] The two convicts were released on parole after only serving two years of their twelve-year sentence. This release was available to Sorenson and Brost because their fraudulent scheme started in 1999, and the Canadian legislation at that time allowed the pair to apply for parole after serving one-sixth of their sentences.[6] Sorenson and Brost were eligible for parole after having served only two years of their sentence, given that their crimes were not considered to be violent.[7]

More recently, K2 & Associates Investment Management Inc., a Toronto-based hedge fund manager, and its founder, Shawn Kimel, and president, Daniel Gosselin, engaged in approximately 60 incidents of spoofing – a concept which will be further elaborated in Part II of the paper – from the period of October 2016 to December 2016. K2 and its representatives fraudulently profited approximately $250,000 from market manipulation.[8] Gosselin and Kimel coordinated their conduct surrounding the spoofing incidents. In some instances, within seconds after Kimel had placed direct electronic access orders to purchase or sell certain options, Gosselin would follow by initiating conversations with Canadian financial institutions to negotiate a larger trade on the opposite side of the order entered by Kimel. Immediately after a

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4 Gary Sorenson, *ibid.*

5 *Ibid.*

6 Bryan Labby, "Con artist who orchestrated Canada's largest Ponzi scam spend only 2 of 12 years in prison" (1 November 2017), online: *CBC News* <www.cbc.ca/news/canada/calgary/brost-sorenson-parole-fraud-ponzi-1.4382289> [perma.cc/7WMC-9VNY].

7 *Ibid.*

8 Barbara Shecter, "Hedge fund founder gets ban over 'spoofing'" (20 October 2018), online: *National Post* <www.pressreader.com/canada/national-post-latest-edition/20181020/282144997323127> [perma.cc/TVM8-PRWX] [Shecter].

successful negotiation, Gosselin would notify Kimel so Kimel could quickly cancel his earlier direct electronic access orders.[9]

In October 2018, the three-member panel of commissioners approved the settlement agreement between the Ontario Securities Commission and K2 and its representatives.[10] Kimel was ordered to pay an administrative penalty in the amount of $550,000, while Gosselin and K2 were ordered to pay an administrative penalty of $20,000 and $400,000, respectively. Kimel was prohibited from trading in any securities or derivatives and acquiring any securities for a period of 9 months and Gosselin for 6 months. Additionally, Kimel was required to have all trades pre-approved by the chief compliance officer of K2 for an additional 18 months and Gosselin for 12 months.[11]

In recent years, incidents of market manipulation and investment fraud have been on the rise in Canada. According to the Canadian Securities Administrators, securities misconduct in Canada, including insider trading, has risen sharply.[12] An analysis from the Canadian Anti-Fraud Centre further depicts that "the amount of money reported lost to investment scams has multiplied by nearly 20 times from 2019 to 2023."[13] In Canada, over the last decade, only a fraction of all reported investment fraud cases

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9 *Ibid.*

10 *In the Matter of K2 & Associates Investment Management Inc., Shawn Kimel and Daniel Gosselin* (19 October 2018), 2018-60, online: Ontario Securities Commission <www.capitalmarketstribunal.ca/sites/default/files/pdfs/proceedings/rad_20181019_k2-associates_0.pdf> [perma.cc/MKB5-3MDB].

11 *Ibid.*

12 Nichola Saminather, "Canada has seen jump in insider trading, misconduct since pandemic start – regulator" (22 June 2021), online: *Reuters* <www.reuters.com/world/americas/canada-has-seen-jump-insider-trading-misconduct-since-pandemic-start-regulator-2021-06-22/> [Saminather].

13 Austin Lee, "'Some of the toughest cases': Investment fraud running rampant across Canada" (17 January 2024), online: *CTV News* <ottawa.ctvnews.ca/some-of-the-toughest-cases-investment-fraud-running-rampant-across-canada-1.6730689> [perma.cc/298R-TC7A].

resulted in criminal charges, and nearly half of the criminal charges were dropped each year.[14]

The lenient treatment of white-collar crimes such as market manipulation and investment fraud in Canada is especially concerning, given the more advanced methods of investment fraud and market manipulation that accompany the rise in technology and artificial intelligence. For instance, nowadays, a fraudster could easily create their own cryptocurrency token and advertise them through social media.[15] Further, the ease of placing and removing a direct electronic access order assisted K2, Gosselin, and Kimel in engaging in "60" incidents of spoofing in a mere two months.[16] With the evolution of the method of financial fraud and market manipulation, millions of dollars can potentially vanish within seconds. The victims of investment fraud and market manipulation, in most cases, sustain large-scale and devastating losses that are not in any manner less significant than the traumatic experiences of the victims of violent crimes. It is imperative that the Canadian justice system begin to hold white-collar criminals accountable and impose stiffer penalties for investment fraud and market manipulation in order to protect the public and boost investor confidence in the financial market.

This article highlights the lenient nature of sentences for large-scale, multi-million-dollar market manipulation and Ponzi schemes and the dangers associated with them, namely, the unlikelihood to sufficiently serve as specific or general deterrence, the breach of investor and public confidence in the financial market, and ultimately, the failure to fulfill the role of securities legislation. This article seeks to achieve the stated objectives by advocating for a greater application of criminal law and the imposition of harsher penalties and sentences for securities offences involving market manipulation and investment fraud through four parts. Part II

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14 Nicole Brockbank, "Only a fraction of fraud cases makes it through Ontario's justice system 0 and it's getting worse" (27 February 2023), online: *CBC News* <www.cbc.ca/news/canada/toronto/few-frauds-get-through-ontario-justice-system-1.6759211> [perma.cc/9B4L-GJGE].

15 Saminather, *supra* note 12.

16 Shecter, *supra* note 8.

provides an overview of common methods of market manipulation and investment fraud and. Part III examines the current Canadian provincial and territorial securities law regulatory framework and the *Criminal Code* for establishing market manipulation and investment fraud. Part III also explores the provincial and territorial securities commission's use and application of quasi-criminal powers. Building on that foundation, Part IV analyzes the application of securities regulatory framework and quasi-criminal and criminal legal framework to market manipulation and financial fraud cases and the resulting penalties imposed across the different Canadian jurisdictions. Part IV then discusses the current concerns surrounding lenient penalties and sentences in the aforementioned cases and anticipates potential problems. Part V proposes solutions to the concerns explored in Part IV and anticipates the potential challenges associated with the proposed solution. Finally, this paper closes by circling back to the Sorenson and Brost case and emphasizes the need for greater criminal prosecution for market manipulation and investment fraud matters and for more stringent application of criminal law and stiffer penalties and sentences to white-collar crimes.

II. BACKGROUND & DEFINITION

A. *Market Manipulation*

Market manipulation refers to the purchase and sale of securities using certain trading practices to artificially distort the price of securities and control the financial markets.[17] As stated by the British Columbia Securities Commission in paragraph 114 of *Siddiqi (Re)*, a list of conduct recognized as "hallmarks" of an attempt to manipulate the market include:

> Wash trades (trades with no change of beneficial ownership), trading with the object of inducing others to purchase, trades or orders that lead to an artificial price for a security, trades or orders that create a misleading appearance of trading activity, orders made without a bond ride intention to deliver the cash or securities necessary to settle the trade, trade through nominee accounts, pre-arranged trades, market

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17 *Kilimanjaro Capital Ltd (Re)*, 2021 LNABASC 4 at para 165.

> domination, uptick trades, involvement in opening and closing trades, high closing, [and] uneconomic trading.[18]

Market manipulation has existed as early as the seventeenth century.[19] Market manipulation techniques and methods have evolved and become more advanced and diversified as artificial intelligence and other forms of advanced technology are increasingly used to manipulate the market, causing growing concerns for regulatory bodies. Not only do manipulated markets contribute to economic instability and financial uncertainty, but they can also harm the economy and reduce public confidence in financial markets, resulting in significant consequences for the market, the public, and investors. The prominent types of market manipulation include pump and dumps, insider trading, wash trading, front running, pre-arranged trading, and spoofing.

1. Pump and dump

In a pump and dump scheme, the promoter of the scheme purchases a considerable number of publicly traded shares to drive up the share price rapidly and then consequently sells these shares into the artificial market they have created to make a sizeable profit.[20] Once the promotion of the share price ends, a crash of the share price results and investors own shares that are worth significantly less than their purchase price. The scheme organizers may promote the shares through multiple avenues, including social media and newsletters.[21]

Pump and dump schemes are prohibited offences under the *Criminal Code,* and such schemes, according to the British Columbia Securities Commission in *Application 20211018 (Re)*, also contravene the insider trading and market manipulation

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18 *Siddiqi (Re)*, 2005 LNBCSC 375 at para 114 [*Siddiqi*].

19 Marius-Christian Frunza, *Introduction to the Theories and Varieties of Modern Crime in Financial Markets* (Amsterdam: Elsevier, 2016) at 111-121.

20 "Pump and Dump Scheme", online: *BC Securities Commission* <www.investright.org/avoid-fraud/types-of-investment-scams/pump-dump-scheme/> [perma.cc/XR2D-95ZL].

21 *Ibid.*

provisions of the *Securities Act*.[22] Pump and dump schemes cause serious harm to the investing public as innocent investors purchase stocks at artificially inflated prices and suffer financial losses after the orchestrator of the scheme ceases to promote the price of the shares.[23]

2. Insider trading

Insider trading occurs when a person who is in a special relationship with an issuer and possesses knowledge of a material fact or a material change about the issuer that has not been disclosed to the general public buys or sells securities of the issuer. Common insiders include shareholders, employees, or officers of an issuer.[24]

A similar concept, tipping, is prohibited pursuant to the securities legislation. An issuer and any individual in a special relationship with the issuer are prohibited from conveying a material fact or a material change about the issuer before that information has been generally disclosed to the public and the marketplace. The only exception where tipping is not treated as an offence is when it is in the necessary course of business.[25] While it is considered an infraction of the securities legislation when a tipper conveys a material fact or change about the issuer before that information becomes available to the general public, to be convicted under section 382.1(2) of the *Criminal Code* for tipping, an additional criterion is imposed, requiring the tipper to knowingly convey inside information with the "knowledge" that there is a risk that the tippee will use the information to directly or indirectly purchase or sell securities.[26]

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22 *British Columbia (Director of Civil Forfeiture v Cuatro Cienagas Inversiones Ltd*, [2020] BCJ No 2264 [*Cuatro*] and *Application 20211018 (Re)*, 2022 BCSECCOM 418. See also *Rashid v Alberta (Securities Commission)*, [2023] AJ No 142.

23 *Cuatro, ibid.*

24 Halsbury's Laws of Canada (online), *Insider Trading*, "Insider Reporting and Insider Trading: Insider Trading and Tipping: Prohibitions Insider trading" (VI.4. (1)) at HBC-156.

25 *Ibid.*

26 *Criminal Code*, RSC 1985, c C-46, s 382.1(2) [*Code*].

The securities law of all Canadian provinces and territories prohibits insider trading and tipping.[27] Additionally, section 382.1 of the *Criminal Code* criminalizes insider trading and tipping.[28]

3. Wash trading

Wash trading is defined by the Alberta Securities Commission in *De Gouveia (Re)* as "a trade in which the buyer and seller are the same. Although appearing as a purchase-and-sale transaction like any other, ultimate ownership has not changed – the parent trade is just a mirage."[29]

Wash trading creates the false appearance that the public market is more active and liquid than it is. This can inflate the prices of security instruments as the manipulating party raises the

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27 *Securities Act*, RSA 2000, c S-4, s 147(3) [*Alberta*]. *Securities Act*, RSBC 1996, c 418, s 57.2(2) [*British Columbia*]. The *Securities Act*, CCSM c S50, s 112(2) [*Manitoba*]. *Securities Act*, SNB 2004, c S-5.5, s 147(2) [*New Brunswick*]. *Securities Act*, RSNL 1990, c S-13, s 77(1) [*Newfoundland and Labrador*]. *Securities Act*, RSNS 1989, c 418, s 82(1) [*Nova Scotia*]. *Securities Act*, RSO 1990, c S5, ss 76(1), 76(6) [*Ontario*]. *Securities Act*, RSPEI 1988, c S-3.1, ss 1(y), 155(1) [*PEI*]. *Securities Act*, CQLR, c V-1.1, ss 187, 189 [*Quebec*]. *Securities Act*, 1988, SS 1988-89, c S-42.2, s 85(3) [*Saskatchewan*]. *Securities Act*, SNWT 2008, c 10, ss 1(1), 155(1) [*Northwest Territories*]. *Securities Act*, SNu 2008, c 12, ss 1(1), 155(1) [*Nunavut*]. *Securities Act*, SY 2007, c16, ss 1, 155(1) [*Yukon*].

28 *Code, supra* note 26, s 382.1. Note that in addition to the additional criterion required to establish tipping occurred under the *Criminal Code*, there are also significant differences in the standard of proof, initiation of proceedings, and sanctions between securities law and criminal law remedies for insider trading and tipping. The standard of proof in administrative proceedings for insider trading and tipping is proof on the balance of probabilities that it is more likely than not that the alleged misconduct occurred, on the other hand, the standard of proof in criminal proceedings for insider trading and tipping is proof beyond a reasonable doubt. Administrative proceedings for insider trading and tipping are initiated by the provincial or territorial securities commission while criminal law proceedings for insider trading and tipping are initiated by the Crown counsel. Administrative sanctions for insider trading and tipping may include cease trade order, monetary penalties, prohibition from relying on exemptions and/ or from becoming or acting as a director or officer of an issuer while criminal penalties are more stringent and involve fines and imprisonment.

29 *De Gouveia (Re),* 2013 LNABASC 110 at para 49 [*De Gouveia*].

price of the instrument trade after trade, leading unknowledgeable investors to purchase the security investments at artificially inflated prices.[30] By bolstering trading revenue figures through deceptive practices, wash trades distort genuine supply and demand and are contrary to the public interest.[31]

4. Front running

Front running is described by the Ontario Securities Commission in *Biscotti et al (Re)* as a manipulative trading practice that involves trading based on non-disclosed private information about forthcoming market transactions.[32] Front running is a prohibited form of market manipulation. Given its manipulative nature, the British Columbia Securities Commission considered front running a form of insider trading.[33]

Front running, in the broker-client context, refers to the broker trading ahead of a client and buying or selling securities while in possession of, but before executing, a client's order to purchase or sell securities. A broker owes a fiduciary duty to their client in most cases.[34] According to the Supreme Court of Canada, the fiduciary must act in the best interest of the beneficiary by exercising a high standard of care in executing the client's order, avoiding conflict of interest, and extending loyalty, trust, and confidence.[35] The broker makes a profit by prioritizing their

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30 *Ryckman (Re)*, 1996 LNABASC 18 at paras 17-18 & 25-26.

31 *De Gouveia*, *supra* note 29.

32 *Biscotti et al (Re)*, 1992 LNONOSC 394 [*Biscotti*].

33 *KSP v JTP*, [2023] BCJ No 1344.

34 *Frame v Smith*, [1987] 2 SCR 99, sets out the three criteria for determining whether a fiduciary duty exists:

> "Relationships in which a fiduciary obligation ha[s] been imposed seem to possess three general characteristics: (1) The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. (3) The beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

35 *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at 28-29.

position before executing their client's order, given that subsequent trading activity increases the value of securities. By so doing, the broker thus breaches their fiduciary duty to their client.[36] Front running distorts fair trading practices in the financial market and is a form of cheating the market by the broker through the broker's use of non-public market information to obtain an economic gain.[37] In Ontario, the practice of front running in the broker-client context constitutes a breach of the Regulation under the Ontario *Securities Act* requiring brokers to "deal fairly, honestly and in good faith with the customers and clients" of the broker and contravenes the By-laws of the Investment Dealers Association.[38]

5. Pre-arranged trading

Pre-arranged trading is a manipulative trading strategy "for which the terms of the trade were agreed upon, prior to the entry of either the order to purchase or to sell on a marketplace, by the persons entering the orders or by the persons on whose behalf the orders are entered."[39] The securities are exchanged at a specific and mutually agreed upon pre-arranged price. A pre-arranged trade may take place when the client requests to "cross" with a particular order at a mutually agreed to and specific pre-arranged price.[40] Such transactions breach investor confidence and fail to treat all holders of identical shares fairly.[41] The Nova Scotia Supreme Court in *R v Colpitts* justified that pre-arranged trading gives a misleading appearance as to the strength of the market during the period when the trading occurred.[42]

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36 *Biscotti, supra* note 32.

37 *Toronto-Dominion Bank (Re)*, 2019 LNONOSC 381 at para 3.

38 *Ibid* at paras 106-108.

39 "Akbar Securities NewsLetter (TM) – Issues (f/k/a/ Allen and Akbar Securities NewsLetter (TM)) – 2008," *Akbar Securities NewsLetter (TM)* (1 June 2008) (Lexis+).

40 *Ibid*.

41 *Dominick & Dominick Securities Inc*, [2002] RSDD No 10. See also *Jeske*, [2002] RSDD No 8.

42 *R v Colpitts*, [2018] NSJ No 291.

When speaking to the illegality of pre-arranged trading, the British Columbia Securities Commission in *Siddiqi (Re)* clarifies, "[w]e note that there is nothing inherently wrong with pre-arranged trades. What makes a pre-arranged trade improper is that it is made with the intention to manipulate the market. Therefore, simply proving that a pre-arranged trade occurred is not enough. The evidence must also show that the pre-arranged trade was made for the purposes of manipulation."[43]

6. Spoofing

Spoofing is a manipulative trading strategy where the "spoofer" places a large, anonymous order to purchase securities and cancels the order fractions of a second later before it is executed.[44] Such trading activities are especially concerning as the large orders create a misleading appearance of high demand. This misrepresentation in the supply and demand for securities falsely draws other traders to purchase the securities, allowing the spoofer to sell the securities at a significantly higher price than would otherwise have been possible.[45] Spoofing is an illegal activity, and it is prohibited by Canadian securities regulators, including the Canadian Securities Administrators.[46]

Recent technological advancements further facilitate the manipulative trading practice of spoofing through automated order systems and direct electronic access. In recent years, high-frequency trading has enabled spoofers to engage in fully automated trading through complex systems and algorithms, allowing trades to be executed in an exceptionally fast manner.[47]

The securities regulator in K2's spoofing incidents reasons that spoofers "get 'an unfair advantage over law-abiding market

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43 *Siddiqi, supra* note 18 at para 120. See also *Myatovic (Re)*, 2012 LNIIROC 47 at para 300.

44 David Johnston et al, *Canadian Securities Regulation*, 5th ed (LexisNexis Canada Inc, 2014) [Johnston et al].

45 *Li (Re),* 2015 LNIIROC 26 at para 4. See also Johnston et al, *supra* note 44.

46 *Ibid.*

47 Johnston et al, *supra* note 44.

participants' by injecting false information into the market," thus undermining market integrity and impeding competition.[48]

B. *Investment Fraud*

With investment fraud, scammers attempt to incentivize the public to invest in their fraudulent schemes by offering unrealistically high returns in a short period of time, thus enticing the investors to make investment decisions based on false and misleading information. Investment fraud is also known as securities fraud.[49] Common types of investment fraud include cryptocurrency fraud, fraud involving promissory notes, affinity fraud, and, most notably, Ponzi schemes and pyramid schemes.[50] Investment fraud, in many cases, involves large amounts of money. It is often challenging for investors who are victims of an investment scam to realize before it is too late.[51]

Similar to market manipulation, investment frauds are occurring increasingly through online platforms, making it exceedingly difficult for investors to identify the scam. In recent years, cryptocurrency fraud has become more common, with fraudsters using "social media, dating apps, internet ads, or websites" to advertise promise of high returns and fish for victims.[52]

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48 Barbara Shecter, "Investment fund K2 accused of manipulative order 'spoofing' by OSC staff" (17 October 2018), online: *Financial Post* <financialpost.com/news/fp-street/investment-fund-k2-accused-of-manipulative-order-spoofing-by-osc-staff> [perma.cc/4HJC-W6RC].

49 "Market Misconduct", online: *BC Securities Commission* <www.investright.org/avoid-fraud/identify-misconduct/market-misconduct/> [perma.cc/U2AD-6EX8].

50 "Types of Investment Scams", online: *BC Securities Commission* <www.investright.org/avoid-fraud/types-of-investment-scams/> [perma.cc/P2GB-CUVN].

51 "Investment frauds" (23 February 2023), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/fraud-and-scams/tips-and-advice/investment-scams> [perma.cc/L4NU-NKVE] [Investment frauds 2023].

52 *Ibid*. See also "Measuring the Extent of Cyber-Fraud in Canada" (2011), online (pdf): *Public Safety Canada* <publications.gc.ca/collections/collection_2011/sp-ps/PS14-4-2011-eng.pdf> [perma.cc/KW5B-ZRSB].

According to a report completed by the Criminal Intelligence Service of Canada, securities fraud has become increasingly sophisticated over the past several years. As a consequence, law enforcement agencies across Canada have observed a rise in the sophistication of securities frauds conducted through cyberspace that involve intricate schemes and domestic and offshore facilitators.[53] The Canadian Anti-Fraud Centre reported losses of 308.6 million dollars to investment fraud in 2022, a significant increase from the total loss of 164 million dollars reported by the Canadian Anti-Fraud Centre in 2021.[54] The following section explores the main types of investment fraud, including Ponzi schemes and pyramid schemes.

1. Ponzi scheme

As described by the trial judge in *R v Samji*, a Ponzi scheme is "… a fraudulent investment operation that lures investors by promising high returns [and short-term gains]. It pays investors with the money contributed by subsequent investors and not with profits earned by a genuine investment."[55] A Ponzi scheme may ultimately collapse when the promoter of the scheme fails to attract new investors.[56]

Most Ponzi schemes involve a large amount of money, often tens and hundreds of millions of dollars. As discussed earlier, Sorenson and Brost wrongfully acquired about 200 million dollars from approximately 2,400 investors in their Ponzi scheme.[57] More recently, Charles DeBono was convicted of fraud over $5,000 under the *Criminal Code* and received enforcement orders against him from the Ontario Securities Commission for defrauding

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53 Investment frauds 2023, *supra* note 52.

54 Competition Bureau Canada, "Quick easy money? Sometimes it's a quick easy LIE" (1 March 2023), online: *Government of Canada* <www.canada.ca/en/competition-bureau/news/2023/03/quick-easy-money-sometimes-its-a-quick-easy-lie.html> [perma.cc/8WCK-BQJ7] [Competition Bureau Canada].

55 *R v Samji*, [2016] BCJ 1059 at para 1 [*Samji* 2016].

56 *Samji (Trustee of) v Whitemore*, [2017] BCJ No 2143.

57 Gary Sorenson, *supra* note 3.

investors of approximately 29 million dollars.[58] Ponzi schemes are illegal under the *Criminal Code*, and considered a contravention of the *Securities Act*.[59]

2. Pyramid scheme

Pyramid schemes are illegal in Canada, and promoting or participating in a pyramid scheme is prohibited under the *Criminal Code*.[60] Pyramid schemes make money by recruiting people to join the scheme rather than by providing a legitimate service or selling a product of value.[61] The person at the top of the pyramid scheme convinces others to pay a large membership fee to join the scheme. Participants at the second level of the pyramid then attempt to recover their money by convincing more people to participate. This pattern continues, and the base of the pyramid expands as more people join the scheme.[62]

The following distinct features of a pyramid scheme contribute to its illegality:

> (i) buys the right to receive compensation for convincing others to "invest" in a plan, which is typically a distributorship, franchise or other business opportunity for a specific sum of money (head hunting); (ii) must buy a certain required amount as a condition of participation in a plan; (iii) may be subject to inventory loading of product in commercially unreasonable amounts; or (iv) may be subject to an inadequate or non-disclosed product return policy.[63]

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58 *In the Matter of Charles Debono* (18 October 2023), online: Ontario Securities Commission <www.capitalmarketstribunal.ca/sites/default/files/2023-10/soa_20231018_debonoc.pdf> [perma.cc/9VRR-TJGG].

59 *Ibid*. See also *R v Samji*, [2017] BCJ No 2429 [*Samji* 2017].

60 *Nother (Re)*, 2020 LNIIROC 22.

61 "Pyramid schemes" (23 August 2023), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/fraud-and-scams/tips-and-advice/pyramid-schemes> [perma.cc/XXW5-QL5S].

62 Johnston et al, *supra* note 44 at chapter 3.03.

63 Brian A Facey & Dany H Assaf, *Competition and Antitrust Law: Canada and the United States*, 5th ed (Toronto: LexisNexis Canada Inc, 2019) at chapter 10.

Inevitably, pyramid schemes collapse because recruitment cannot continue indefinitely.[64] When a pyramid scheme collapses, most participants, other than the instigators, lose their money.[65]

III. LEGAL FRAMEWORK/ LEGAL TEST

Generally, the securities regulatory system achieves its objectives by allowing for the imposition of sanctions on individuals who engage in illegal market manipulation and investment fraud via three major enforcement avenues – regulatory or administrative avenue, quasi-criminal avenue, and criminal avenue.[66] Common administrative sanctions include monetary penalties, denials of exemptions, cease trade orders, and prohibitions from acting as a director or officer. Quasi-criminal sanctions, also known as penal sanctions, consist of an imprisonment term or fines or both. Finally, criminal sanctions involve more severe sentences imposed under the *Criminal Code*.[67] The fact that the accused has received administrative sanctions does not preclude them from a subsequent criminal proceeding or vice versa.[68]

Administrative enforcement places a less onerous burden of proof on the Staff of the Securities Commission than the burden of proof in quasi-criminal or criminal enforcement.[69] In an administrative hearing, the Staff of the Securities Commission must demonstrate, through the civil standard of proof on a balance of probabilities, based on clear and cogent evidence, that it is more likely than not the alleged misconduct occurred as alleged. Accordingly, the hearing panel "must be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is

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64 *R v Friskie*, [2003] SJ No 533, 177 CCC (3D) 72.

65 *Mazo v Canada*, 2016 TCC 232 (CanLII) at paras 15-16.

66 Johnston et al, *supra* note 44.

67 *Ibid.*

68 *Samji* 2017, *supra* note 59 See also *Samji* 2016, *supra* note 55.

69 Johnston et al, *supra* note 44.

more likely than its nonexistence or non-occurrence."[70] The burden of proof in quasi-criminal proceedings involving market manipulation and investment fraud matters falls under the "balance of probabilities" standard.[71] On the other hand, the burden of proof in criminal proceedings related to securities law violations is the "beyond a reasonable doubt" standard.[72] Part III will proceed by examining each enforcement avenue in terms of the severity of its sanctions, with the purely administrative or regulatory action lying at the one extreme of the spectrum, criminal enforcement at the other, and quasi-criminal enforcement in between.[73]

A. *Provincial/ Territorial Legislation: The Securities Act*

Pursuant to provincial and territorial securities legislation, Staff of the Securities Commission of all Canadian jurisdictions may take administrative and/or quasi-criminal enforcement actions against any person who has contravened the securities legislation.[74]

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70 *Budzinski (Re),* 2023 LNABASC 4 at para 16.

71 *R v Landen*, [2009] OJ No 2411 [*Landen*]. Although the burden of proof in quasi-criminal proceedings involving market manipulation and investment fraud matters falls under the balance of probabilities standard, the burden of proof in quasi-criminal proceedings for strict liability regulatory offences is proof beyond a reasonable doubt. See *R v Cahill,* 2009 MBPC 57 at para 6, where the Manitoba Provincial Court reasoned that where the offences charged are strict liability regulatory offences, "[t]he prosecution bears the burden of proof beyond a reasonable doubt" that the accused did in fact committed the alleged acts and that the alleged acts constitute the offences charged. According to the Manitoba Provincial Court, "…it is then up to the accused to establish the defence that he was 'duly diligent' to avoid the commission of the offence."

72 Johnston et al, *supra* note 44 .

73 *Ibid*.

74 *Ibid*.

1. Administrative/ Regulatory Enforcement

The securities commission of each province and territory may hear market manipulation and securities fraud matters in an administrative proceeding and impose regulatory sanctions against any person for any infraction of the securities law. Currently, statutory reciprocal order provisions have been adopted in every province and territory, excluding Nunavut.[75] Any enforcement order made by any provincial and territorial securities commission imposing sanctions, restrictions, and conditions will be automatically reciprocated in all Canadian jurisdictions except Nunavut.[76]

Most Canadian jurisdictions include relevant provisions in their securities legislation specific to market manipulation and investment fraud. Currently, provincial and territorial securities legislation of most Canadian jurisdictions contains a provision prohibiting fraud and market manipulation. The provinces and territories that carry this provision in the *Securities Act* include British Columbia, Alberta, New Brunswick, Nova Scotia, Ontario, PEI, Quebec, Saskatchewan, Northwest Territories, Nunavut, and Yukon.[77] These market manipulation and fraud provisions all carry similar wording. At present, Manitoba lacks a fraud and market manipulation provision in its *Securities Act*. Section 57 of the British Columbia *Securities Act* provides an example of the wording of the fraud and market manipulation provision:

> **Manipulation and fraud**

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75 "Which CSA jurisdictions have adopted a statutory reciprocal order provision?" online: *SEDAR+* <www.sedarplus.ca/onlinehelp/regulatory-action/search-and-view-regulatory-actions/faqs-relating-to-disciplinary-actions-and-cease-trade-orders/which-csa-jurisdictions-have-adopted-a-statutory-reciprocal-order-provision/> [perma.cc/8CFU-YCL6] [CSA Statutory Order].

76 *Ibid.*

77 *Alberta, supra* note 27, s 93(1), 93(2); *British Columbia, supra* note 27, s 155(1); *New Brunswick, supra* note 27, s 69; *Nova Scotia, supra* note 27, ss 30R, 132A; *Ontario, supra* note 27, s 126.1, 126.4; *PEI, supra* note 27, s 152; *Quebec, supra* note 27, ss 195.2, 199.2; *Saskatchewan, supra* note 27, ss 26.7, 55.1; *Northwest Territories, supra* note 27, ss 152, 156.2; *Nunavut, supra* note 27, s 152; *Yukon, supra* note 27, ss 152, 156.2.

> 57 (1) A person must not, directly or indirectly, engage in or participate in conduct relating to a security, derivative or underlying interest of a derivative if the person knows, or reasonably should know, that the conduct
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security,
>
> (b) contributes to a fraud perpetrated by another person, or contributes to another person's attempt to commit a fraud, relating to a security, derivative or underlying interest, or
>
> (c) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a derivative or an underlying interest of a derivative.
>
> (2) A person must not, in relation to a security, derivative or benchmark,
>
> (a) perpetrate a fraud, or
>
> (b) attempt to perpetrate a fraud.[78]

The British Columbia Court of Appeal in *Anderson v British Columbia (Securities Commission)* discusses the standard for holding an individual accountable under the market manipulation and fraud provision of the *Securities Act*. According to the *Anderson* decision, the market manipulation and fraud provision of the *Securities Act* necessitates proof of fraud, including proof of a guilty mind and dishonest intent. Such proof requires an examination of the alleged market manipulator or fraudster's subjective knowledge of the facts that constitute the dishonest act.[79] The Alberta Securities Commission later in *Henning (Re)* confirmed that Staff of the Commission, on a balance of probabilities, to establish sufficiently clear, convincing and cogent evidence of improper trading motive and intent of the accused to affect or move the public market price.[80] In *Henning (Re)*, the Alberta Securities Commission used circumstantial evidence to draw inferences about the accused's knowledge and intent.[81]

Further, most Canadian jurisdictions – including Manitoba, Alberta, New Brunswick, Nova Scotia, Ontario, PEI, Quebec, Saskatchewan, Northwest Territories, Yukon, and Nunavut – have

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78 *British Columbia*, supra note 27, s 57(1).

79 *Anderson v British Columbia (Securities Commission)*, [2004] BCJ No 8.

80 *Henning (Re)*, 2008 LNABASC 289.

81 *Ibid.*

securities legislation that incorporates a provision prohibiting the making of misleading or untrue statements in the context of market manipulation.[82] For instance, section 112.3(1) of the Manitoba *Securities Act* provides guidance on the prohibition against the making of misleading and untrue statements:

> **Misleading or untrue statements**
> 112.3(1) A person or company must not make a statement that the person or company knows or reasonably ought to know
>
> (a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or 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 or derivative.[83]

Finally, securities regulators may also impose administrative sanctions and make enforcement orders against any individuals charged with market manipulation or financial fraud on the basis of public interest consideration.[84] For instance, the Ontario Securities Commission has heard many cases pursuant to section 127(1) of the Ontario *Securities Act* – orders in the public interest provision – of the Ontario *Securities Act* to consider whether it is in the public interest to make one or more of the order(s) with respect to sanctions and costs set out under section 127(1).[85] On the other hand, the Manitoba *Securities Act* lacks a specific provision identical to section 127(1) of the Ontario *Securities Act*. However, acting improperly and contrary to the public interest is often a significant factor behind the Manitoba Securities Commission's allegation

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82 *Alberta, supra* note 27, ss 92(4.1), 92(4.2); *Manitoba, supra* note 27, s 112.3(1); *New Brunswick, supra* note 27, ss 44.7, 181; *Nova Scotia, supra* note 27, ss 30Q, 132B; *Ontario, supra* note 27, s 126.2(1), 126.3; *PEI, supra* note 27, s 146(1); *Quebec, supra* note 27, s 199.2; *Saskatchewan, supra* note 27, ss 26.6, 55.11(1); *Northwest Territories, supra* note 27, ss 146(1), 156.1; *Nunavut, supra* note 27, s 146(1); *Yukon, supra* note 27, ss 146(1), 156.1.

83 *Manitoba*, *supra* note 27, s 112.3(1).

84 *Ontario, supra* note 27, s 127(1).

85 *Ibid.*

against an individual[86] and may serve as the principal basis for the Commission's making of administrative orders.

National Instrument 23-101, developed by the Canadian Securities Regulators and adopted by all 13 Canadian jurisdictions, provides further guidance on the prohibition of deceptive and manipulative trading, including trading activities that may create false public market prices and are detrimental to investor confidence and market integrity.[87]

2. Quasi-Criminal Enforcement

Not only can the provincial and territorial securities commission make administrative enforcement against any individual for infractions of the securities law, but securities commissions also have the authority to pursue market manipulation and investment fraud cases quasi-criminally under the Provincial Offences Act. Securities matters that proceed quasi-criminally are heard before the Provincial Court.[88] The Securities Commission's authority to lay quasi-criminal charges against every person who has contravened the securities law is embodied in the Securities Act throughout all jurisdictions in Canada.[89]

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86 See, for example, *In the Matter of the Securities Act and In the Matter of Gregory David Klassen* (31 January 2000), online: The Manitoba Securities Commission <docs.mbsecurities.ca/msc/hp/en/item/101594/index.do?q="public+interest">.

87 "National Instrument 23-101" (2017), online (pdf): *Ontario Securities Commission* <www.osc.ca/sites/default/files/pdfs/irps/ni_20170410_23-101_unofficial-consolidatation-cp.pdf> [perma.cc/JH8M-SN6M].

88 "Court proceedings," online: *Ontario Securities Commission* <www.osc.ca/en/enforcement/court-proceedings#:~:text=The%20Ontario%20Securities%20Commission%20(OSC,the%20Ontario%20Court%20of%20Justice.> [perma.cc/W2PF-XR7F].

89 *Alberta, supra* note 27, s 194(1); *British Columbia, supra* note 27, s 155(1); *Manitoba, supra* note 27, s 136(1); *New Brunswick, supra* note 27, s 179(2); *Newfoundland and Labrador, supra* note 27, s 122(1); *Nova Scotia, supra* note 27, s 129(1); *Ontario, supra* note 27, s 122(1); *PEI, supra* note 27, s 164(1); *Quebec, supra* note 27, ss 202, 203; *Saskatchewan, supra* note 27, s 131(2); *Northwest Territories, supra* note 27, s 164(1); *Nunavut, supra* note 27 , s 164(1); *Yukon, supra* note 27, s 164(1).

The securities laws of all Canadian jurisdictions contain a provision – known as the general offence provision – stating that a person is "guilty of an offence" if they contravene any provision of the securities legislation. The general offence provision encompasses a wide array of possible offences, such as contraventions of the registration and prospectus requirements and continuous disclosure requirements and includes infractions of the insider trading and tipping provisions, market manipulation, and securities fraud.[90] In most quasi-criminal proceedings, the securities regulators are not required to establish the *mens rea* element to secure a conviction, and the burden of proof in quasi-criminal proceedings for securities law contraventions falls under the balance of probabilities standard.[91]

For example, section 136(1) of the Manitoba Securities Act speaks to the Manitoba Securities Commission's power to oversee quasi-criminal matters:

> **General offences**
> 136(1) Every person or company that
> (a) makes a statement in any material, evidence, or information submitted or given under this Act or the regulations to the commission, its representative, or the Director, or to any person appointed to make an investigation or audit under this Act, that, at the time, and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact, the omission of which makes the statement false or misleading; or
> (b) makes a statement in any application, report, prospectus, return, financial statement, disclosure document in respect of a designated derivative, or other document, required to be filed or furnished under this Act or the regulations that, at the time, and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact, the omission of which makes the statement false or misleading; or
> (c) contravenes this Act, the regulations or a rule specified in a regulation under clause 149(cc); or

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90 Halsbury's Laws of Canada (online), Contravention of securities laws, "Enforcement: Penal Sanctions: Penal Offences" (XII.2. (1)) at HSC 295.

91 *Ibid.*

> (d) fails to observe or comply with any order, direction or other requirement made under this Act or the regulations;
> is guilty of an offence and is liable on summary conviction to a fine of not more than $5,000,000. or imprisonment for a term of not more than five years less a day, or both.[92]

Similarly, section 122(1) of the Ontario *Securities Act* mirrors section 136(1) of the Manitoba *Securities Act*:

> **Offences, general**
> 122 (1) Every person or company that,
> (a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Chief Executive Officer of the Commission or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
> (b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or
> (c) contravenes Ontario securities law, is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.[93]

B. *Federal Legislation: The Canadian Criminal Code*

In addition to the securities regulators' administrative and quasi-criminal enforcement powers, the Crown Prosecutor may also deal with market manipulation or investment fraud under the federal *Criminal Code*.

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92 *Manitoba, supra* note 27, s 136(1).

93 *Ontario, supra* note 27, s 122(1).

1. Criminal Proceeding

In addition to the provincial and territorial securities laws, three provisions of the Canadian *Criminal Code* – sections 380(1), 380(2), and 382 – are relevant in addressing market manipulation and securities fraud matters. The conduct proscribed by sections 380(1)(a) and 380(2) are indictable offences carrying lengthy maximum sentences, and sections 380(1)(b) and 382 are hybrid offences.[94] Sections 380(1), 380(2), and 382 are rarely used since improper conduct of the kind addressed by the three provisions is typically dealt with by the securities regulators through the *Securities Act* and its accompanying regulations.

The standard for establishing *mens rea* of the offence of fraud necessary to sustain a conviction for fraud is proof beyond a reasonable doubt of two main elements, which are the accused's "subjective awareness" of the prohibited act and the accused's "subjective awareness" that the prohibited act could have resulted in the deprivation of another.[95] Deprivation may include the accused's knowledge that the victim's financial interests are at risk.[96] As the standard for establishing *mens rea* of fraud is very high, it is challenging to prove the specified intent of the accused corresponding to their making of the purchase and sale orders. In *R. v. Samji*, the British Columbia Securities Commission's finding that Samji perpetrated fraud leads to a separate criminal proceeding under section 380(1)(a) of the *Criminal Code*. However, an accused's belief that their act is not wrong does not constitute a sufficient defence.[97]

The *actus reus* of fraud will be established by proving the prohibited act and the deprivation that results from the prohibited act, which may include actual loss or the exposure of the victim's financial interest to risk. The proof for *actus reus* is based on the

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94 *Code*, *supra* note 26, ss 380(1), 380(2), 382.

95 *R v Théroux*, 19 CR (4th) 194, 79 CCC (3d) 449 [*Théroux*]. See also *R v Zlatic*, 19 CR (4th) 230, 79 CCC (3d) 466.

96 *Théroux*, *supra* note 95.

97 *R v Gatley* (1992), 74 CCC (3d) 468, [1992] BCJ No 1484 (BCCA).

"objective" facts and by reference to what a reasonable person would consider to be dishonest conduct.[98]

Section 380(1) of the *Criminal Code* discusses the sanctions and elements of the offence for fraud over $5,000 and fraud under $5,000:

> **Fraud**
> 380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
> (b) is guilty
>
> (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
> (ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars.[99]

Section 380(2) of the *Criminal Code* addresses the fraudulent manipulation of securities with an "intent" to create a misleading or false appearance of active public trading or affect public market price.[100] Section 380(2) of the *Criminal Code* reads as follows:

> **Affecting public market**
> 380(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.[101]

Section 382 of the *Criminal Code*, commonly known as "wash trading," prohibits the fraudulent manipulation of stock exchange transactions for profit.[102] However, placing purchase and sale

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98 *Théroux, supra* note 95.

99 *Code, supra* note 26, s 380(1).

100 *Regina v MacMillan*, [1968] OJ No 10.

101 *Code, supra* note 26, s 380(2).

102 *R v Potter*, [2020] NSJ No 49, 2020 NSCA 9 (NSCA).

orders that correspond substantially to time, price, and quantity does not constitute an offence per se pursuant to section 382. No offence is committed if the "sole intent" of the alleged manipulator is to stabilize the price, even if it is for the manipulator's advantage.[103] For instance, a purchaser who over-purchased shares at the most advantageous price and intended to have the supply offset the demand is justified to sell some of their shares on the market. Given that the "sole" intent of the alleged manipulator in this case is to stabilize the market price for shares, that purpose alone is legitimate and does not meet the intent element under section 382 of the *Criminal Code*.[104] The illegality only arises if the transactions are entered with the intent to create a misleading or false appearance of active public trading or affect public market price.[105] Section 382 of the *Criminal Code* states:

> **Fraudulent manipulation of stock exchange transactions**
> 382 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,
>
> (a) effects a transaction in the security that involves no change in the beneficial ownership thereof,
>
> (b) enters an order for the purchase of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the security has been or will be entered by or for the same or different persons, or
>
> (c) enters an order for the sale of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the security has been or will be entered by or for the same or different persons.[106]

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103 *Regina v Jay*, [1965] OJ No 997.

104 *Ibid.*

105 *Ibid.*

106 *Code*, *supra* note 26, s 382.

IV. CASELAW

There are limits to administrative penalties given that monetary penalties, denials of exemptions, cease trade orders, and prohibitions from acting as director or officer may not be adequate to serve as either general or specific deterrence. Further, certain securities legislation imposes an upper limit on the amount of compensation that the securities commission is allowed to order the perpetrator to pay the victim, failing to provide sufficient reparation for harm done to the victim. For instance, pursuant to section 148.2(3) of the Manitoba *Securities Act,* the Commission may not order the wrongful person or company to pay the claimant victim a compensation of more than $250,000.[107] On the other hand, the criminal justice system has been treating financial crimes much more leniently than violent crimes. According to the Canadian Centre for Justice Statistics, approximately "two-thirds" of fraud cases result in conviction. For the fraud cases that resulted in convictions, a prison sentence was only ordered in 36% of all fraud cases, and the median length was 60 days for all fraud cases that resulted in a prison sentence.[108] In that same period, the Canadian Centre for Justice Statistics determined that the incarceration rate for aggravated assault is 79%, for sexual assault, is between 52% to 89%, depending on the seriousness of the offence, and for assault with a weapon is 49%. Compared to the median prison sentence of 60 days for fraud cases that resulted in a prison sentence, the average prison sentence for more violent crimes, such as aggravated assault, was 440 days and for assault with a weapon was 132 days.[109] In so doing, not only did the courts fail to properly apply the fundamental sentencing principle, but they also contributed to a host of potential problems.

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107 *Manitoba, supra* note 27, s 148.2(3).

108 Derek E Janhevich, "The Changing Nature of Fraud in Canada," online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x1998004-eng.pdf?st=wghLSmrn> [perma.cc/XWW7-JXX5].

109 A C Birkenmayer & J V Roberts, "Sentencing in Adult Provincial Courts," online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x1997001-eng.pdf?st=T8QRBhiJ> [perma.cc/E4AK-9TK3].

Part IV will illustrate the sentences and penalties imposed on the offenders by examining market manipulation and investment fraud cases that are decided administratively, quasi-criminally, and criminally. The sentencing principles will then be discussed, along with an analysis of how they are applied to quasi-criminal and criminal cases involving market manipulation and investment fraud.

A. *Administrative Penalties*

1. Re Samji

The British Columbia Securities Commission found that Samji contravened section 57(b) of the BC *Securities Act*, the fraud and market manipulation provision, through her nine-year-long Ponzi scheme that involved not less than 200 investors for proceeds totalling at least $100 million.[110] In response, the BC Securities Commission imposed protective and preventive orders under sections 161(1) and 162 of the BC *Securities Act*.

The administrative orders permanently banned Samji from purchasing or trading in securities under section 161(1)(b)(ii) of the BC *Securities Act*, forced Samji to resign from any position she holds as a director or officer of an issuer and permanently prohibited her from holding such positions under sections 161(1)(d)(i) and 161(1)(d)(ii) of the BC *Securities Act*, permanently banned Samji from becoming or acting as a promoter or registrant, from acting in a management or consultative capacity in dealing with the securities market, and from taking part in investor relations activities under sections 161(1)(d)(iii), 161(1)(d)(iv), and 161(1)(d)(v), respectively.[111] BC Securities Commission further ordered Samji and her corporation to pay a fine of approximately

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[110] *Rashida Samji, Rashida Samji Notary Corporation and Samji & Assoc Holdings Inc*, 2015 BCSECCOM 29. See also "BCSC panel fines former notary public $33 million and orders permanent market ban for fraud" (21 January 2015), online: *British Columbia Securities Commission* <www.bcsc.bc.ca/about/media-room/news-releases/2015/06-bcsc-panel-fines-former-notary-public-33-million--and-orders-permanent-market-ban-for-fraud> [perma.cc/WC2K-XFL3].

[111] *Ibid.*

$10 million to the Commission and pay the Commission an administrative penalty of $33 million under sections 161(1)(g) and 162 of the BC *Securities Act*, respectively.[112]

2. Re Kilimanjaro Capital Ltd

K2 & Associates Investment Management Inc., a Toronto-based fund manager, and its founder, Shawn Kimel, and president, Daniel Gosselin, engaged in approximately 60 instances of spoofing from October 2016 to December 2016.[113] K2 and its representatives wrongly profited a sum of approximately $250,000 from the spoofing incidents. The respondents admitted that they contravened the market manipulation section of the Ontario *Securities Act* and acknowledged that they acted in a manner contrary to the public interest.[114]

The approved settlement agreement between the Ontario Securities Commission and K2 and its representatives contained administrative orders pursuant to subsection 127(1) of the Ontario *Securities Act* against Kimel, Gosselin, and K2. Kimel was ordered to pay an administrative penalty in the amount of $550,000, while Gosselin was ordered to pay an administrative penalty of $20,000.[115] Kimel was prohibited from becoming or acting as a chief compliance officer or a designated person for a period of 10 years and Gosselin for a period of 5 years. Additionally, Kimel was prohibited from trading in any securities or derivatives and from acquiring any securities for a period of 9 months and Gosselin for 6 months.[116] In the approved settlement agreement, Kimel was also prohibited from using any exemptions contained in the Ontario

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112 *Ibid.*

113 *In the Matter of K2 & Associates Investment Management Inc, Shawn Kimel and Daniel Gosselin* (16 October 2018), online: Ontario Securities Commission. <www.capitalmarketstribunal.ca/sites/default/files/pdfs/proceedings/set_20181016_k2-associates_0.pdf >.

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

securities law for a term of 9 months and Gosselin for a term of 6 months.[117]

3. DeBono (Re)

More recently, in 2024, the Ontario Securities Commission's Capital Market Tribunal relied on subsection 127(1) of the Ontario *Securities Act* – the tribunal's public interest jurisdiction, which is protective and prospective in nature – in its determination that it is in the public interest to impose administrative sanctions against DeBono.[118] The Ontario Securities Commission sought to remove Charles DeBono from the capital market for operating a large-scale Ponzi scheme that defrauded hundreds of individuals across Canada and other countries and for using the amounts gained from the scheme for personal benefits.[119] After considering the gravity of the offence and the need for specific and general deterrence, the Ontario Securities Commission imposed administrative orders pursuant to subsection 127(1), permanently requiring DeBono to cease trading in any securities or derivatives and to resign from any positions that he holds as a director or officer of any issuer. The Ontario Securities Commission also permanently prohibited DeBono from acquiring any securities, using any exemptions contained in the Ontario securities law, becoming or acting as a director or officer of any issuer, and becoming or acting as a registrant, promoter, or manager.[120]

B. *Quasi-Criminal Sanctions*

1. R v Landen

Landen was convicted of insider trading under section 76(1) of the Ontario *Securities Act* – trading with undisclosed material fact or material change.[121] The trial judge found that Landen, on October 10 and October 24, 2005, sold securities of a company

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117 *Ibid.*

118 *DeBono (Re),* 2024 ONCMT 8.

119 *Ibid.*

120 *Ibid.*

121 *Landen*, *supra* note 71.

while he was a person in a special relationship with that company and possessed knowledge of material facts about the company that had not been generally disclosed to the public.[122] Landen was the controller of the company for 11 years, corporate secretary for eight years and vice president for five years. Landen acquired the undisclosed material facts at the company's management meetings and sold securities accordingly. As a result of selling securities with undisclosed material facts on two occasions, Landen avoided a loss of $115,000.[123]

This matter proceeded quasi-criminally in the Ontario Provincial Court pursuant to section 122 of the Ontario *Securities Act*, where the maximum imprisonment term is five years less a day, and the maximum fine is five million dollars. The Ontario Securities Commission sought a period of 15 to 18 months imprisonment and a significant financial penalty.[124] The Ontario Securities Commission further argued that subsection 122(4) of the Ontario *Securities Act* requires the imposition of a minimum fine equal to the loss avoided and a maximum fine of an amount equal to triple the amount of loss avoided. However, Landen argued that the minimum fine provision does not apply.[125] The Court held that "[f]or a sale of shares to be included in the subsection 122(4) calculation, the person or company convicted must have a direct or indirect beneficial interest in the shares being sold"[126] and ultimately concluded that there is no minimum fine required. In reaching that conclusion, the Court reasoned that it is inaccurate to regard the fact that Landen used the assets obtained from insider trading for personal purposes as evidence of beneficial interest.[127]

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122 *Ibid.*

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

The trial judge ultimately sentenced Landen to 45 days in prison and ordered him to pay a $200,000 fine.[128] The sentencing judge reasoned that the amount of loss avoided by Landen, $115,000, as a result of the insider trading placed the offence at the low end of the spectrum and thus is a mitigating factor. In his sentencing decision, the sentencing judge further justified the sentence by referencing, "the sentencing trends in relation to large scale frauds showed an emphasis on the use of incarceration by way of general deterrence and denunciation."[129] It is concerning to see that 45-day imprisonment out of a maximum imprisonment term of five years less a day is considered sufficient to serve as general deterrence and denunciation.

2. R v Harper

Harper was convicted of two counts of insider trading under section 76(1) of the Ontario *Securities Act*.[130] Harper was the president of a gold mining company. He continued to trade securities after learning a material and unpublished fact about the company, specifically that the test results of the company's soil samples were unpromising.[131] As a result of the two counts of insider trading, Harper avoided losses totalling 3.5 million dollars and used these funds to benefit his family for three years.[132]

This matter proceeded quasi-criminally under section 122 of the Ontario *Securities Act*, where the maximum sentence was two years, and the maximum fine was one million dollars at the time of the sentencing hearing on September 18, 2000.[133] The trial judge sentenced Harper to one-year imprisonment and ordered Harper to pay a fine of approximately four million dollars. In support of the sentence, the sentencing judge provides:

> As in criminal matters, in quasi criminal offences of this nature, the sentencing principles to be applied are designed to prevent like

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128 *Ibid.*

129 *Ibid.*

130 *R v Harper*, [2002] OJ No 8 [*Harper 1*].

131 *Ibid.*

132 *Ibid.*

133 *R v Harper*, [2000] OJ No 3664 [*Harper 2*].

> occurrences and like initiatives by others. They are designed to encourage respect and support for the law and a just and orderly society and in this case securities industry. Canada (and Ontario) should not be jurisdictions of choice for those wishing to engage in insider trading. To achieve this and the other principles set out above, the Court must denounce and repudiate the unlawful conduct; it must deter the accused from repeating that unlawful conduct; it must deter others who hear of these charges and this sentencing from repeating the impugned conduct; it must assist in the rehabilitation of the offender and make the offender feel accountable to the specific, in this case, investment community and the community and society in general.[134]

In 2002, Harper appealed both his conviction and the sentence on two counts of insider trading. The appeal judge dismissed Harper's appeal on conviction and determined that the one-year sentence and fines totalling approximately four million dollars were not within the acceptable range and substituted a sentence of six months imprisonment on each count, to be served concurrently and a total fine of two million dollars.[135] The Ontario Court of Appeal dismissed the Crown's appeal in 2003.[136] The appeal judge's reduction of Harper's one-year sentence to six months imprisonment for illegally avoiding a loss of $3.5 million seems to contradict the sentencing principles espoused by the sentencing judge in support of his sentencing decision.

3. R v Rankin

Rankin was convicted of ten counts of tipping under section 76(2) of the Ontario *Securities Act*.[137] Over 14 months, Rankin provided insider information that he acquired in his role as a senior employee of RBC Dominion Securities to another individual, Duic, who used that information to conduct trades. Duic benefited from the tipped information and earned profits of approximately 4.5 million dollars.[138] The matter proceeded quasi-criminally under section 122 of the Ontario *Securities Act* with a

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134 *Ibid*.

135 *Harper 1*, *supra* note 130.

136 *R v Harper*, [2003] OJ No 4196.

137 *R v Rankin*, [2005] OJ No 4871 [Rankin].

138 *Ibid*.

maximum sentence of five years less a day at the time of Rankin's sentencing hearing. The Ontario Securities Commission recommended three to five years of imprisonment. However, Rankin provided many character letters and argued that he should only be sentenced to probation and community service given his loss of reputation in the business community.[139] The trial judge ordered that Rankin serve a sentence of six months in prison, concurrent with each of the ten violations of the Ontario *Securities Act*.[140]

However, later in February 2008, the Ontario Securities Commission approved its settlement agreement with Rankin, permanently prohibiting him from registering under the Ontario securities law and from becoming a director or officer, requiring him to pay $250,000, and barring him from engaging in any securities transactions for 10 years.[141] Following the approval of the settlement agreement, the Staff of the Ontario Securities Commission unconditionally dropped the quasi-criminal charges against Rankin. Nevertheless, it is concerning that the trial judge, in his October 2005 sentencing decision, reasoned that "…as a quasi-criminal matter, imprisonment should always be the last consideration and for the shortest duration, particularly for a first offender."[142]

C. *Criminal Sanctions*

1. R v Samji

In addition to the penalties imposed by the British Columbia Securities Commission against Samji in the administrative proceeding, Samji was also found guilty of 14 counts of fraud over $5,000 under section 380(1) of the *Criminal Code* and 14 counts of

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139 *Ibid*.

140 *In the Matter of the Securities Act and In the Matter of Andrew Rankin* (19 May 2011), online: Ontario Securities Commission <www.capitalmarketstribunal.ca/sites/default/files/pdfs/proceedings/rad_20111121_rankin_0.pdf> [perma.cc/6H5M-G8A5].

141 *Ibid*.

142 *Ibid*.

theft over $5,000 under section 334(a) of the *Criminal Code*.[143] Samji operated a nine-year-long Ponzi scheme that involved at least $100 million and 200 investors. Samji offered investors "fictional" investment opportunities by representing to the investors that a winery was expanding its business into South Africa and South America and offering investors high returns on their investments.[144] The investors made investments through a trust fund operated by Samji's notary practice, and Samji paid initial investors with the money obtained from the later investors but not the profits earned from a "genuine" investment.[145] The Court registered Samji's convictions of 14 counts of fraud over $5,000 and 14 counts of theft over $5,000 after Samji's failed *Charter* application claiming that since the British Columbia Securities Commission had previously imposed penalties against her, the criminal proceeding constituted an abuse of process contrary to section 7 of the *Charter* and amounted to double jeopardy contrary to section 11(h) of the *Charter*.[146]

The Crown took the position that the proportionate sentence for Samji's convictions was seven to eight years of incarceration and drew attention to the aggravating factors, including that Samji capitalized on her notary status to lure the victims and did not stop her fraudulent scheme until it was discovered, and that Samji's fraud was "elaborate, deliberate, premeditated," and "a big lie" from the outset.[147] The trial judge ultimately sentenced Samji to six years in prison for her fraudulent conduct and emphasized the mitigating factors, including Samji's lack of prior criminal record, her sense of remorse towards the victims and the court, and the fact that she did not contest the registration of convictions on all counts after her *Charter* challenge had failed.[148] Given that the maximum sentence for fraud over $5,000 at the time of Samji's

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143 *R v Samji*, [2016] BCJ No 2109 [*Samji* No 2109].

144 *Ibid.*

145 *Ibid.*

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

sentencing hearing was 14 years incarceration and considering the magnitude of Samji's Ponzi scheme, a sentence of six years imprisonment for the 28 convictions appears lenient.

2. R v Colpitts

Potter and Colpitts were each convicted of fraud affecting the public market price of shares under section 380(2) of the *Criminal Code* and conspiracy to affect the public market price of shares under section 465(1)(c) of the *Criminal Code*.[149] Potter, the CEO of the company, was the mastermind of the scheme, while Colpitts, the lawyer of the company, was the enforcer and executor of the market manipulation. Over the course of 18 months, Potter and Colpitts engaged in manipulative techniques to artificially maintain their company's stock price, including "us[ing] their margin accounts to dominate the buy side of the market, creating a misleading impression of liquidity," suppressing sales of shares by investors and entering stock orders late in the trading day to raise the closing trade price.[150] Potter and Colpitts secured new investors with the misleading and false impression of stock price. The prosecutors estimated that Potter and Colpitts' fraud scheme cost investors approximately $86 million.[151]

At the time of Potter and Colpitts' sentencing hearing, the maximum imprisonment term for either of their convicted offence was ten years. The Crown sought a sentence totalling ten to twelve years of incarceration for each offender on both convicted offences.[152] The sentencing judge imposed a sentence of five-year imprisonment on Potter concurrent for each offence and four-and-a-half-year imprisonment on Colpitts concurrent for each offence.[153] The sentencing judge considered various elements of Potter and Colpitts' scheme as aggravating factors, including the significant impact on a large number of victims, the complexity, duration, and degree of planning of their fraud, the negative effects

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149 *R v Colpitts*, [2018] NSJ No 291 [*Colpitts*].

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 *Ibid.*

on the Canadian capital markets, the defendants' knowledge that their conduct violated securities laws, and the defendants' reliance on their reputation in the Halifax business and legal communities to the abuse the investors' trust.[154] Ultimately, the sentencing judge viewed delay, despite the defendants having partially contributed to some delay, as the most significant mitigating factor.[155] The Nova Scotia Court of Appeal later dismissed Potter and Colpitts' appeal of their sentence.[156] The sentencing decision of *Colpitts* further demonstrates the Courts' lenient treatment of individuals convicted of complex and large-scale fraudulent market manipulation schemes, even where the value of the fraud is as significant as $86 million.

3. R v DeBono

In the criminal proceeding of *R v DeBono*, DeBono was charged with one count of fraud over $5,000 under section 380(1) of the *Criminal Code* and one count of money laundering for the operation of a Ponzi scheme.[157] DeBono marketed and promoted investment in his business venture, a scam from the outset, which enticed hundreds of individuals across Canada and other countries to make investments totalling over 29 million dollars.[158] DeBono's Ponzi scheme created significant economic difficulties for the victims, given that they lost their retirement funds and life savings. Ultimately, DeBono moved much of the money that he gained from the fraudulent scheme to the Dominican Republic, away from investors and Canadian law enforcement agencies. DeBono was arrested in the Dominican Republic. He pleaded guilty to one count of fraud over $5,000 and one count of money laundering.[159]

The sentencing judge ordered a restitution of $26,910,772 and a sentence of seven years imprisonment for DeBono's fraud over $5,000 charge, where the maximum sentence for the offence is a

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154 *Ibid.*

155 *Ibid.*

156 *R v Potter*, [2020] NSJ No 49.

157 *R v DeBono*, [2002] OJ No 3169 [DeBono].

158 *Ibid.*

159 *Ibid.*

14-year jail sentence.[160] The sentencing judge considered as mitigating factors that DeBono pled guilty, had no prior criminal record and had been in custody throughout the Covid-19 pandemic.[161] There were many significant aggravating factors, including that DeBono operated the Ponzi scheme over a lengthy period of time, engaged in other criminal activity to execute the fraud, sent victims fabricated documents, moved funds offshore to the Dominican Republic, and fled to the Dominican Republic when his Ponzi scheme collapsed. Additional aggravating factors include that DeBono's Ponzi scheme was sophisticated as it involved deliberate conduct and considerable planning and extreme as it involved $29 million in losses from hundreds of victims, and the victims were sent fabricated documents and sustained significant economic losses.[162]

In the sentencing decision, it was further reasoned that a sentence of four to six years incarceration would fail to take into account the size and impact of DeBono's fraudulent scheme and his moral blameworthiness while a sentence of nine years incarceration would fail to factor in the mitigating effect of DeBono's guilty plea.[163] It is surprising to learn that although the sentencing judge concluded that DeBono had more aggravating factors than mitigating factors, the sentencing judge ultimately emphasized the effect of the guilty plea that it overrides DeBono's high moral culpability associated with his sophisticated scheme involving "considerable planning and very deliberate conduct."[164] The sentencing decision of *DeBono* evinces the need to address lenient sentences in complex, large-scale, and inter-jurisdictional schemes.

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160 *Ibid.*

161 *Ibid.*

162 *Ibid.*

163 *Ibid.*

164 *Ibid.*

D. *Summary of the Trend of sanctions and the application of sentencing principles to market manipulation and investment fraud matters*

There are limitations when it comes to administrative penalties. Canadian securities regulators aim to maintain investor confidence in the financial market, protect the investing public, and achieve specific and general deterrence through administrative penalties.[165] Nevertheless, monetary penalties, denials of exemptions, cease trade orders, and prohibitions from acting as a director or officer are not sufficient to serve as general or specific deterrence or protect investors from market manipulation and investment fraud. This is evidenced by the fact that many offenders of market manipulation and securities fraud had prior administrative discipline records by the securities regulators.[166] Not only are the administrative sanctions insufficient to fulfill the goals of securities regulation, but administrative penalties are not intended to be punitive in nature, nor are they adequately deterrent in effect. In fact, the BC Court of Appeal in *Samji* held that while an administrative monetary penalty may be substantial – for instance, the BCSC imposed an administrative penalty of 33 million against Samji under section 162 of the BC *Securities Act* – it did not constitute true penal consequence.[167] Therefore, criminal law penalties, one of the objectives of which is to serve a punitive role and denounce unlawful conduct, must play a more extensive role in addressing market manipulation and securities fraud.

While administrative penalties are limited in their effects when addressing market manipulation and securities fraud, quasi-criminal and criminal sanctions seem to have been disproportionately and unfitly lenient, even for large-scale, inter-jurisdictional, and multimillion-dollar schemes. A six-month prison term for two counts of insider trading involving $3.5

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165 "Introduction to the Canadian Securities Administrators," online: Canadian Securities Administrators <www.securities-administrators.ca/wp-content/uploads/2021/08/Introduction_to_CSA_170206_Eng.pdf> [perma.cc/4W3D-2GFG].

166 See for example, *Samji, supra* note 143.

167 *Ibid*.

million[168] and a six-year prison term for operating a nine-year-long Ponzi scheme involving 100 million dollars and 200 investors[169] seem lenient. Further, DeBono's seven-year prison sentence for committing one of the "largest" Ponzi schemes in Canada involving more than 29 million dollars and investors from across Canada and around the world is far from the high end of the spectrum, which carries a maximum sentence of 14 years incarceration.[170]

Section 718.1 of the *Criminal Code* sets out the fundamental principle of sentencing that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[171] Section 718.2 of the *Criminal Code* provides further guidance on sentencing principles in relation to aggravating and mitigating circumstances, requiring a sentence to be increased or reduced to take into account any relevant aggravating or mitigating factors.[172] *R v Wust* sets out the framework for determining a fit and proportionate sentence. As discussed by Justice Arbour of the Supreme Court of Canada in *Wust*, "[i]n deciding on the appropriate sentence, the court is directed by Part XXIII of the Code to consider various purposes and principles of sentencing, such as denunciation, general and specific deterrence, public safety, rehabilitation, restoration, proportionality, disparity, totality and restraint, and to take into account both 'aggravating and mitigating factors.'"[173] Although section 718.2(a)(i) through (vii) of the *Criminal Code* provides general guidance on the circumstances considered as aggravating factors,[174] the sentencing judges are not limited to the list provided under section 718.2 of the *Criminal Code* in considering the aggravating factors in their sentencing decision. Sentencing judges have wide discretion in determining what is an aggravating or mitigating factor and in

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168 *Harper 1*, *supra* note 130.

169 *Samji*, *supra* note 143.

170 *DeBono*, *supra* note 157.

171 *Code*, *supra* note 26, s 718.1. See also section 718.2 of the *Criminal Code* for further guidance the relevant sentencing principles.

172 *Code*, *supra* note 26, s 718.2.

173 *R v Wust*, [2000] 1 SCR 455.

174 *Code*, *supra* note 26, s 718.2.

balancing such factors to arrive at a sentence. Given that sentencing judges have a wide degree of discretion and flexibility when determining what constitutes aggravating or mitigating factors and balancing these factors, what is considered a fit and proportional sentence may vary among different judges.

The sentencing decisions in *Samji* and *DeBono* are subtle examples that demonstrate the sentencing judges' discretion in considering and balancing aggravating and mitigating factors. In *Samji*, the sentencing judge ultimately sentenced Samji to six years in prison while emphasizing the mitigating factors of Samji's remorse towards her victims, her lack of prior criminal record, and the fact that she did not contest the registration of convictions on all counts after her *Charter* challenge had failed.[175] On the other hand, the sentencing judge in *DeBono* ordered a seven-year prison term after determining that DeBono's guilty pleas and his lack of prior criminal record were mitigating factors, despite that the size and the complexity of the fraud are considered an aggravating factor and DeBono's Ponzi scheme involved $29 million while Samji's scheme involved $100 million.[176] Given that Samji's scheme generated a more substantial loss than DeBono's scheme and her sentence is more lenient than DeBono's sentence, the sentencing judge must have exercised their discretion in the sentencing decision.

The sentencing judge in *R v Boyle* ruled that the overarching sentencing principle of general deterrence applies when imposing a sentence for a contravention of the *Securities Act*.[177] By failing to impose sentences proportionate to the severity of the market manipulation and investment fraud, the overarching sentencing principle of general deterrence will not be achieved.

V. PROBLEMS & SOLUTIONS

Various problems are associated with lenient sentences and penalties in the context of market manipulation and financial

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175 *Samji*, *supra* note 143.

176 *Ibid.* See also *DeBono*, *supra* note 157.

177 *R v Boyle*, 2002 ABPC 136 at para 24.

fraud – including reduced market efficiency, distorted prices, failure to deter the public and perpetrators, and, most importantly, reduced investor confidence and public distrust of the financial market.[178] The emerging advancements in the methods of conducting fraudulent trades and schemes and differences in securities law across the Canadian provinces further necessitate a more extensive application of criminal law to address market manipulation and securities fraud. Part VI will conclude by proposing that the ultimate solution to mitigating the problems and achieving general deterrence and specific deterrence is to impose harsher sentences and more stringent criminal sanctions when addressing market manipulation and securities fraud matters.

A. *Problems associated with lenient sanctions and sentences*

As explored in Part IV, administrative penalties are limited in their effects, while quasi-criminal and criminal proceedings result in lenient sanctions and sentences when addressing most market manipulation and investment fraud matters, even for the most egregious schemes. Lenient sanctions and sentences lead to a host of problems and ultimately fail to fulfill the role of the securities regulators and the purpose of sentencing.

1. Insufficient specific or general deterrence

Lenient sanctions and sentences are insufficient to provide either specific or general deterrence as the manipulators and fraudsters learn that they will not face significant repercussions and perceive the potential gains to outweigh the associated risks. Therefore, lenient sentences and penalties increase the likelihood of recidivism and the probability that other members of the public engage in market manipulation and financial fraud, making it more difficult for securities regulators to deter such conduct.

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178 Rebecca Soderstrom, "Regulating Market Manipulation: An Approach to designing Regulatory Principles" (2011), online (pdf): *Uppsala Faculty of Law* <www.jur.uu.se/digitalAssets/585/c_585476-l_3-k_wps_2011_1.pdf> [perma.cc/7C7A-HBKW].

According to a report by the Government of Canada, "[s]ecurities fraud offenders had higher rates of recidivism than other 'high-status' white-collar crime offenders" with "recidivists… mov[ing] from place to place while developing new fraudulent schemes."[179]

2. Public distrust of the financial market & breach of investor confidence

More importantly, the lack of harsh sanctions and sentences erodes investor confidence and contributes to public distrust of the financial market. Market manipulation and investment fraud distort market prices with artificially inflated or deflated prices, contributing to the instability and volatility of the financial market and significantly hindering the efficient functioning of the economy. When investors and the public learn about instances of market manipulation and financial fraud, distrust results as they question the unfairness and lacking transparency of the financial market. This has the potential to result in reduced economic growth as the lack of public and investor confidence in the financial market leads to a decrease in investments.

3. Failure to fulfill the role of securities regulators and the purpose of sentencing

Ultimately, a lack of stringent sanctions and sentences in addressing market manipulation and investment fraud matters fail to fulfill the role of securities regulators as lenient sentences and penalties fail to protect innocent investors, adequately act as a deterrent for potential misconduct and erode investor confidence and public trust in the financial market.

Further, by failing to adhere to the fundamental principle of sentencing and order sentences that are proportionate to the severity of the market manipulation and investment fraud in question, the purpose of sentencing "of denounce[ing] unlawful conduct; deter[ing] the offender and other persons from committing offences; separate[ing] offenders from society, where

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179 "Organized Crime Research Brief no 2: POP and Securities Fraud" (2022), online (pdf): *Public Safety Canada* <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rgnzd-crm-brf-2/rgnzd-crm-brf-2-eng.pdf > [perma.cc/2LTZ-FWDA].

necessary; [and] promot[ing] a sense of responsibility in offenders, and acknowledgement of the harm done to victims of to the community"[180] are not achieved. Therefore, reduced market efficiency, distorted prices, reduced investor confidence, and public distrust of the financial market perpetuate as lenient sanctions fail to deter the public or separate the perpetrators from society.

B. *Solution to the Proposed Concerns*

1. Enhanced Enforcement Action

Recently, the SCC heard the appeal in *Attorney General of Canada, et al v Attorney General of Quebec* about the constitutionality of the implementation of a pan-Canadian securities regulation after Quebec's appellate court found that the Constitution of Canada does not authorize the implementation of such a regime.[181] A unified national securities regulator is intended to promote greater cooperation between provincial and territorial securities regulators to "better assess and minimize systemic risk in capital markets and to improve regulatory enforcement."[182] To date, six Canadian jurisdictions – British Columbia, Ontario, Saskatchewan, New Brunswick, Prince Edward Island and the Yukon – have supported the proposal for a Cooperative Capital Markets Regulatory System, and the effort to establish a uniform securities regulator has been ongoing since the 1970s. It is regretful that the SCC found the government's proposed federal legislation

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180 *Code, supra* note 26, s 713. See also *Harper 2, supra* note 133 at para 12.

181 Elizabeth Raymer, "SCC hears Canada and Quebec AGs arguments on national securities regulator," online: *Canadian Lawyer* <www.canadianlawyermag.com/news/general/scc-hears-canada-and-quebec-ags-arguments-on-national-securities-regulator/275015> [Raymer]. See Josh Rubin, "Concerns and praise meet Court's decision against national securities regulator," online: *Toronto Star* <www.thestar.com/business/concerns-and-praise-meet-court-s-decision-against-national-securities-regulator/article_ab424c38-5400-599f-8827-59f303b6a6aa.html> [Rubin]. See also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [*Pan-Canadian Securities Regulation*].

182 Raymer, *ibid*.

calling for uniform national securities regulator unconstitutional and recommended cooperative schemes involving both federal and provincial governments.[183]

With the continued lack of a uniform national securities regulator, it is imperative that the securities commissions enhance their enforcement action, which may be accomplished through two main approaches: stronger inter-jurisdictional cooperation between securities regulators and expedited procedures.

In most cases, large-scale investment frauds are inter-jurisdictional in nature and may involve investors from around the world. Canada's largest Ponzi scheme organized by Sorenson and Brost allegedly involved an amount between $100 to $400 million that affected as many as 2,000 individual investors across Canada and globally. Justice Hall described Sorenson and Brost's Ponzi scheme as a "complicated means" for the victims to invest through an "offshore company."[184] In fact, Sorenson and Brost had been sanctioned by the US Securities and Exchange Commission and the Alberta Securities Commission in addition to their criminal proceedings in Canada.[185] Recently, Charles DeBono's 29-million-dollar Ponzi scheme defrauded close to 600 innocent investors across Canada and other countries, including Nigeria.[186] It is crucial to promote prevention rather than just repairing the large-scale harm that resulted from the incidence of market manipulation and investment fraud.

Currently, pursuant to the *Extradition Act*, Canadian courts may commit individuals accused of large-scale and international market manipulation and investment fraud schemes for extradition where the country seeking the extradition provides sufficient evidence for the extradition of the accused.[187] Recently,

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183 *Ibid.* See Rubin, *supra* note 182. See also *Pan-Canadian Securities Regulation*, *supra* note 182.

184 *Breitkreutz, supra* note 3.

185 *Ibid.*

186 *DeBono, supra* note 157.

187 See for example, "Vancouver Man Extradited to the United States for Role in Penny Stock Fraud" (13 July 2023), online: *United States Attorney's Office*

the British Columbia Supreme Court committed a Hells Angel member and his associate for extradition to the United States for securities fraud charges under criminal law.[188] The extradition process started with the US Attorney's Office making a request and the Department of Justice Canada approving the request. The BC Supreme Court determined that the US Attorney's Office provided sufficient evidence for the extradition of a Hells Angel member and his associate.[189] The two defendants may appeal the BC Supreme Court's decision, further apply for a judicial review of the BC Court of Appeal's decision (where the BC Court of Appeal's decision still conforms with the BC Supreme Court's decision), and seek leave to appeal the judicial review decisions to the Supreme Court of Canada where the judicial review confirms the decision of the BC Court of Appeal.[190]

Further, securities regulators should establish better and more comprehensive expedited investigative and hearing procedures for market manipulation and investment fraud cases. In recent years, a panel of three commissioners found that the Manitoba Securities Commission took 11 years to reach a decision for a case involving allegations of stock market manipulation. The panel expressed its concerns over the 11-year period, an extraordinary delay that breaches the overriding purposes of securities legislation to protect the investing public.[191] Extraordinary delays associated with large-scale and complex securities law infringements necessitate the development of better and more comprehensive rules surrounding

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<www.justice.gov/usao-ma/pr/vancouver-man-extradited-united-states-role-penny-stock-fraud> [perma.cc/XE6T-GSNW].

188 Graeme Wood, "Hells Angel, ex-stockbroker can be extradited to US, BC judge rules" (23 January 2024), online: *Burnabynow* <www.burnabynow.com/highlights/hells-angel-ex-stockbroker-can-be-extradited-to-us-bc-judge-rules-8152908> [perma.cc/M5UG-DDKP].

189 *Ibid*.

190 *Ibid*.

191 Vera-Lynn Kubinec, "Securities regulator slammed for taking 11 years to resolve stock market manipulation case" (29 July 2021), online: *CBC News* <www.cbc.ca/news/canada/manitoba/securities-regulator-11-years-stock-market-manipulation-case-1.6121832> [perma.cc/manage/create?folder=130904].

expedited procedures. Expedited investigative and hearing procedures will more efficiently streamline the proceedings and address potential concerns associated with limited resources, backlog of cases, and delay.

2. Advanced Detection Systems

It is becoming increasingly problematic that technological advancement progressively contributes to better and more effective ways to manipulate the market and commit complex, large-scale investment frauds. According to a report completed by the Criminal Intelligence Service of Canada, securities fraud has become increasingly complex over the past several years. In response to the rise in the "complexity" of securities fraud, law enforcement agencies across Canada have observed an increase in sophisticated securities frauds conducted through cyberspace that involve intricate schemes and domestic and offshore facilitators.[192]

The Canadian Anti-Fraud Centre reported losses of 308.6 million dollars to investment fraud in 2022, a significant increase from the total loss of 164 million dollars reported by the Canadian Anti-Fraud Centre in 2021.[193] The CSA Investor Index of 2009 further reported that 4% of Canadians have been victims of investment fraud The amount invested by the victims in fraudulent investments has also increased, with 38% invested in $5,000 or more in 2009, compared with 32% in 2006. Most money lost by the investors is never returned to them.[194] Similarly, our American counterpart is experiencing substantial losses from fraudulent investment schemes compared to any other type of fraud. In 2022, According to statistics from the Federal Trade Commission, Americans reported a loss of $3.82 billion to investment fraud, an

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192 "Public Safety Canada: Measuring the Extent of Cyber-Fraud in Canada" (2011), online (pdf): Public Safety Canada <publications.gc.ca/collections/collection_2011/sp-ps/PS14-4-2011-eng.pdf> [Public Safety Canada].

193 Competition Bureau Canada, *supra* note 54.

194 Public Safety Canada, *supra* note 193.

increase of $1.67 billion or 128% from 2021.[195] According to a report by the Ontario Securities Commission exploring the use of Artificial Intelligence in the Ontario Capital Markets, "the most mature use of AI in capital markets is focused on three principal areas: (i) improving the efficiency and accuracy of operational process; (ii) trade surveillance and detection of market manipulation; and (iii) supporting advisory and customer service."[196] Nevertheless, the use of Artificial Intelligence for risk management purposes in the Canadian capital markets is still a novel and expanding area. Accordingly, it is crucial that all Canadian securities commissions commit to continuing the improvement of more advanced investigation techniques and detection systems to accompany the increasingly complex methods of market manipulation and investment fraud.

3. The Imposition of harsher criminal sanctions

Ultimately, criminal law is necessary to supplement securities regulators' quasi-criminal powers and should be a main avenue for prosecuting market manipulation and investment fraud. Relying on securities law alone to address market manipulation and investment fraud is insufficient on multiple grounds.

As explored in Part III, securities commissions of all Canadian jurisdictions (except for Nunavut) have adopted statutory reciprocal order provisions. An example is with respect to cease trade orders. Where a cease trade order is made against an individual by any provincial or territorial securities commission, it will automatically be reciprocated in all Canadian jurisdictions except for Nunavut.[197] This is problematic because market

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195 Ryan W Neal, "A record $3.82 billion was stolen through investment fraud in 2022, a 128% increase over the previous year" (3 July 2023), online: *InvestmentNews* <www.investmentnews.com/fintech/news/ai-scams-contribute-to-rise-in-investment-fraud-239440> [perma.cc/BDB3-HT6S].

196 <https://oscinnovation.ca/resources/Report-20231010-artificial-intelligence-in-capital-markets.pdf> [perma.cc/J3C6-PZGL].

197 "Determining where a CTO has effect," online: *Canadian Securities Administrators* <www.securities-administrators.ca/enforcement/cease-trade-orders-overview/determining-where-a-cto-has-effect/> [perma.cc/LL9E-SUDJ].

manipulators and fraudsters who received a cease trade order or other enforcement orders from another provincial or territorial securities regulator are not required to comply with that order in Nunavut.

In addition to the lack of reciprocity between Canadian provinces and territories, the securities laws of each Canadian jurisdiction also contain slight variations. As discussed in Part III, while most Canadian jurisdictions contain a provision in their securities legislation prohibiting fraud and market manipulation, provinces including Manitoba and Newfoundland and Labrador lack a market manipulation and fraud provision in their securities legislation,[198] which may contribute to inconsistent enforcement actions.

Further, relying only on securities enforcement may not be sufficient to compensate the victims. Although victims of market manipulation and financial fraud may apply for financial loss claims, securities law of some Canadian jurisdictions has an upper limit on the compensation amount the Commission is allowed to order the perpetrator to pay. For instance, in Manitoba, the Commission may not order the wrongful person or company to compensate the victim more than 250,000 dollars.[199] Addressing market manipulation and securities fraud through the criminal law avenue reconciles the upper limit on the compensation amount prescribed by the Manitoba *Securities Act*. When market manipulation and securities fraud matters proceed through the criminal law avenue, sentencing judges have the discretion to make a sizeable and substantial restitution order pursuant to section 738 of the *Criminal Code*.[200] In *Samji*, the sentencing judge ordered Samji to pay restitution to 20 victims totalling $10,497,216.[201] Recently, in *DeBono*, the sentencing judge made a restitution order amounting to $26,910,772.[202]

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198 CSA Statutory Order, *supra* note 76.

199 *Manitoba*, *supra* note 27, s 148.2(3).

200 *Code*, *supra* note 26, s 738.

201 *Samji*, *supra* note 143.

202 *DeBono*, *supra* note 157.

Therefore, to ensure securities commissions across Canada achieve their objectives of protecting the public and investor confidence in the financial market and deterring recidivism and the general public, increased criminal prosecutions for market manipulation and investment fraud are necessary, and harsher sentences and criminal sanctions must be imposed, especially for large-scale and inter-jurisdictional schemes. Further, courts must ensure consistent application of sentences and penalties to all market manipulation and investment fraud cases across Canada with identical circumstances and similar degrees of culpability.[203]

VI. CONCLUSION

To achieve the securities regulators' objectives of general and specific deterrence, ensure the promotion of capital market efficiency, and enhance the protection of public interest and investor confidence, harsher sentences must be imposed. In the past and more recently, criminal law in Canada treats financial crimes much more leniently than violent crimes. The fact that Sorenson and Brost were released on parole after serving two years of their twelve-year sentence for operating Canada's largest Ponzi scheme fails to recognize the victims' sufferings or address the perpetrators' moral culpability.[204]

White-collar crimes, albeit not violent in nature, almost always result in significant and lasting impacts on a large number of victims and erode the financial market. Mant victims of market manipulation and investment fraud lose their livelihoods while the perpetrators continue to prosper from the assets they wired overseas. In fact, in a 2007 CSA Investor Study, 91% of Canadians agreed that "the impact of investment fraud can be just as serious

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[203] Anita Anand, "Comment: Securities law needs more enforcement, not more laws", Comment, (2008) The Lawyers Weekly.

[204] Bill Kaufmann, "Ponzi scheme architects already out of prison, stunning man who helped foil their scam" (2 November 2017), online: *Calgary Herald* <calgaryherald.com/news/crime/ponzi-scheme-architects-already-out-of-prison-stunning-man-who-helped-foil-their-scam> [perma.cc/28SG-LNKB].

as the impact of crimes like robbery and assault."[205] Courts must stop treating a lack of violence as an implicit justification for a lighter sentence, earlier parole, or more lenient sanctions.

Although securities law of most Canadian jurisdictions contains a provision on market manipulation and fraud, case law consistently demonstrates that relying on administrative sanction is insufficient. Temporary cease trade orders, non-application of exemptions, and prohibitions from acting as a director or officer do not serve as adequate deterrence, while monetary penalties rarely provide victims with adequate compensation. On the other hand, maximum sentences or financial penalties are rarely, if ever, imposed on cases that proceeded quasi-criminally under the *Provincial Offences Act*. Further, given the high standard of proof associated with criminal proceedings, market manipulators and fraudsters are rarely charged under the *Criminal Code*. Even for more egregious cases where they are convicted under the *Criminal Code*, it is exceedingly unlikely that they receive sentences on the high end of the spectrum.

The trend of lenient penalties and sentences against market manipulation and financial fraud is especially concerning in a generation where technological advancement progressively contributes to better and more effective ways to manipulate the market. Technological advancements facilitate large-scale and multi-jurisdictional schemes that necessitate more than just the development of more advanced detection techniques and the implementation of better inter-jurisdictional collaboration between regulators, law enforcement, and investigators. The ultimate solution is to increase criminal prosecutions in response to market manipulation and investment fraud and impose harsher sentences consistently across Canada for such offences in a manner proportionate to the harm caused by the offence.

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[205] "2007 CSA Investor Study: Understanding the Social Impact of Investment Fraud" (2007) at 5, online (pdf): CSA <www.securities-administrators.ca/uploadedFiles/General/pdfs/2007InvestorStudy_ExecSummary-English.pdf https://www.securities-administrators.ca/uploadedFiles/General/pdfs/2007InvestorStudy_ExecSummary-English.pdf> [perma.cc/L8A4-JY4W].