



Ontario  
Securities  
Commission

Commission des  
valeurs mobilières  
de l'Ontario

22nd Floor  
20 Queen Street West  
Toronto ON M5H 3S8

22e étage  
20, rue Queen Ouest  
Toronto ON M5H 3S8

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Citation: Epix Resource Finance Corporation (Re), 2020 ONSEC 28

Date: 2020-11-19

File No. 2020-29

**IN THE MATTER OF  
AN APPLICATION BY EPIX RESOURCE FINANCE CORPORATION REGARDING  
ABERDEEN INTERNATIONAL INC.**

**ORAL REASONS AND DECISION ON STANDING  
(Section 127 of the *Securities Act*, RSO 1990, c S.5)**

**Hearing:** November 19, 2020

**Decision:** November 19, 2020

**Panel:** Timothy Moseley Vice-Chair and Chair of the Panel  
Lawrence P. Haber Commissioner  
Frances Kordyback Commissioner

**Appearances:** David Hausman For Epix Resource Finance  
Jonathan Wansbrough Corporation

Steven Sofer For Aberdeen International Inc.  
Andrew Locatelli  
Scott Kugler

Robert Gain For Staff of the Commission

## ORAL REASONS AND DECISION ON STANDING

*The following reasons have been prepared for publication in the Ontario Securities Commission Bulletin, based on the reasons delivered orally in the hearing as edited and approved by the panel, to provide a public record of the oral reasons.*

- [1] Section 127 of the *Securities Act* empowers the Ontario Securities Commission to make various orders against a person or company, if the Commission determines that it is in the public interest to do so. Such orders typically result from a proceeding commenced by Staff of the Commission's Enforcement Branch. On rare occasions, they result from a proceeding commenced by a private party.
- [2] Epix Resource Finance Corporation seeks to make this one of those rare occasions. Epix applies to the Commission for an order under s. 127 against Aberdeen International Inc., of which Epix is a shareholder.
- [3] The purpose of today's hearing was to consider whether Epix should have standing to proceed with its application. We have concluded that Epix should not, for the following reasons.
- [4] Epix asserts, and Aberdeen denies, that Aberdeen is a non-redeemable investment fund, as that term is defined in Ontario securities law, and that Aberdeen has failed to comply with obligations that apply to non-redeemable investment funds, including by engaging in related party investments that violate applicable restrictions. Epix asks that the Commission order Aberdeen to revise its practices and procedures, and to amend and restate certain continuous disclosure documents.
- [5] Epix's request for standing presents one core issue. Is it in the public interest for Epix's concerns about Aberdeen to be addressed in a proceeding of this kind, instead of in some other way?
- [6] The question of whether an issuer is a non-redeemable investment fund is complex. Answering that question requires consideration of whether the issuer's primary purpose is to invest funds raised, rather than to deploy the funds for some other purpose. It also requires consideration of whether the issuer invests for the purpose of exercising control of, or being actively involved in the management of, the issuers in which it invests. These considerations raise important policy questions about the management of conflicts of interest, and about disclosure to investors.
- [7] Staff of the Commission works on an ongoing basis to promote compliance with Ontario securities law, including as it relates to non-redeemable investment funds. Staff has an array of tools available to it, including informal discussions with market participants, published guidance, compliance reviews, investigations (sometimes aided by powers of compulsion) and, in some cases, the right to commence proceedings before the Commission or a court. Staff is obligated to use these tools in a manner that is proportionate, and that is consistent with the Commission's mandate as set out in the *Securities Act*.
- [8] Why, then, might a private party apply to the Commission for an order against another private party? It is well established that an applicant may do so in the context of a pending or proposed merger or acquisition in which the applicant has a sufficient interest. The Commission has also held, in *Re MI Developments*

*Inc.* (2009 ONSEC 47, (2010) 33 OSCB 126), and in subsequent decisions, that in limited circumstances outside the context of a merger or acquisition, an applicant may seek a s. 127 order.

- [9] For the purposes of the case before us, we need not discuss in detail the parties' submissions about the appropriate test. We need only focus on one part of that test that is indisputably central to the question of standing. That is, would it be in the public interest to permit the applicant to continue, even assuming that the applicant has satisfied all of the other criteria?
- [10] To the extent that Epix's own interests are at stake, rather than the public interest, Epix acknowledges that it could apply to the Superior Court for a declaration that Aberdeen is not complying with Ontario securities law. Epix claims, however, that the public interest favours Epix having its concerns addressed before the Commission rather than in a court. Epix's justification for that claim, namely that the Commission is a specialized tribunal, does not provide a sufficient connection to the public interest.
- [11] To the extent that Epix seeks the resolution of broader policy issues, we agree with Aberdeen's submission that Staff plays an important gatekeeper role in ensuring that Commission resources are allocated appropriately. For us, this is a fatal flaw in Epix's request for standing. Epix has adduced no evidence about what steps, if any, it has taken to persuade Staff to act on its concerns. Nor has Epix offered any compelling reason why it is in the public interest for its concerns to bypass Commission Staff's usual processes, thereby avoiding the nuanced and policy-based filtering, prioritization and tool selection that are an essential part of those processes.
- [12] In deciding that Epix should not have standing to proceed, we do not purport to modify in any way the existing test for standing on a s. 127 application. Instead, we apply that test, and we find that Epix has failed to meet it. Epix has identified no circumstance that makes this case an exception to the general rule. Because of our conclusion that Epix does not have standing to proceed, the application is dismissed.

Dated at Toronto this 19<sup>th</sup> day of November, 2020.

"Timothy Moseley"

Timothy Moseley

"Lawrence P. Haber"

Lawrence P. Haber

"Frances Kordyback"

Frances Kordyback