



Ontario
Securities
Commission

Commission des
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de l'Ontario

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Citation: Stuart (Re), 2021 ONSEC 8
Date: 2021-03-03
File No.: 2021-1

**IN THE MATTER OF
MARILYN DIANNE STUART**

**REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: In Writing

Decision: March 3, 2021

Panel: Wendy Berman Vice-Chair and Chair of the Panel

Submissions: Ryan Lapensée For Staff of the Commission

No submissions made by or on behalf of
Marilyn Dianne Stuart

REASONS AND DECISION

I. OVERVIEW

- [1] On December 2, 2019, Marilyn Dianne Stuart (**Stuart**) was convicted by Justice Rose of the Ontario Court of Justice (the **Ontario Court**) of defrauding investors of approximately \$1.1 million.¹ After pleading guilty to the offence, Stuart was sentenced to a conditional custodial sentence of two years less a day, to be served in the community, and ordered to pay \$1.1 million in restitution to the MFDA Investor Protection Corporation.²
- [2] Staff of the Ontario Securities Commission (**Staff**) applies for a protective order in the public interest pursuant to s. 127(10) of the *Securities Act* (the **Act**),³ which provides that an order may be made under s. 127(1) of the Act against a person who has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives. Staff submits that this precondition has been met and that it is in the public interest based on these circumstances to make an inter-jurisdictional enforcement order permanently prohibiting Stuart from participating in Ontario's capital markets.
- [3] For the reasons that follow, I find that Stuart's conviction arose from a course of conduct related to securities, and that it is in the public interest to permanently prohibit Stuart's participation in Ontario's capital markets by issuing the order requested by Staff.

II. SERVICE AND PARTICIPATION

- [4] Staff served Stuart with the Notice of Hearing, Statement of Allegations and Staff's hearing brief, written submissions and brief of authorities by courier at her last known address.⁴ Following service of these materials, Staff received an email from Stuart in which she advised, among other things, that she did not intend to participate in the hearing due to her financial and health circumstances.⁵
- [5] Staff elected to proceed by way of the expedited procedure for a written hearing provided for in the Commission's *Rules of Procedure and Forms*.⁶ As stated in the Notice of Hearing, Stuart had 21 days from the date of service to file a request for an oral hearing, and 28 days from the date of service to file a hearing brief and written submissions. The deadlines for Stuart to request an oral hearing and to serve and file written submissions have passed. No request for an oral hearing was made and no materials were filed by or on behalf of Stuart.

¹ Exhibit 1, Staff's Hearing Brief, Transcript of Guilty Plea Proceedings before the Honourable Justice D.S. Rose dated December 2, 2019 (Ontario Court of Justice) in the matter of *R v Marilyn D. Stuart*, Tab 3 (**Guilty Plea Transcript**), at 7

² Exhibit 1, Staff's hearing Brief, Transcript of the Reasons for Sentence before the Honourable Justice D.S. Rose dated December 19, 2019 (Ontario Court of Justice) in the matter of *R v Marilyn D. Stuart*, Tab 4 (**Sentencing Transcript**) at 9, 16 and 17

³ RSO 1990 c S.5

⁴ Exhibit 2, Affidavit of Service of Michelle Spain, sworn January 22, 2021 at para 2

⁵ Exhibit 3, Supplementary Affidavit of Service of Michelle Spain, sworn February 18, 2021 at Exhibit A

⁶ (2019) 42 OSCB 9714 (**OSC Rules of Procedure**), r 11(3)

[6] Pursuant to the *Statutory Powers Procedure Act*⁷ and the OSC Rules of Procedure,⁸ the Commission may proceed in the absence of a party who has been provided adequate notice of a proceeding. I am satisfied that Stuart was provided with adequate notice of this proceeding and that I may proceed in her absence.

III. FACTUAL BACKGROUND

A. Conduct at Issue, Guilty Plea and Conviction

[7] Stuart was registered in Ontario as a mutual fund dealing representative with W.H. Stuart Mutuals Ltd. (**WH Stuart**) from September 28, 2009 to May 9, 2013 and as the ultimate designated person from November 20, 2009 to May 9, 2013.⁹

[8] Stuart's criminal conduct is described in the agreed statement of facts filed as part of the guilty plea before the Ontario Court. The key facts are as follows.

[9] During the period January 1, 2004 to May 31, 2013, Stuart participated in an investment scheme to defraud investors. The investors, consisting primarily of retired teachers and police officers, invested their commuted valued pensions with WH Stuart in instruments marketed by WH Stuart as guaranteed investments with an annual interest rate of five percent to ten percent or as cash accounts.¹⁰

[10] Stuart was a co-owner and a director of WH Stuart and related entities. Stuart controlled the bank accounts in which investor funds were deposited and directed the financial affairs and operations of WH Stuart.¹¹

[11] The investors had varying understandings of the specific investment product that they were purchasing but they all expected that their funds would be held in cash or cash equivalents or used for purchases of investment products that would return five to ten percent annually.¹²

[12] The investor funds were not invested as promised and instead were diverted without investor authorization and used to pay interest and return principal to other investors or paid to other entities and persons related to WH Stuart.¹³

[13] Stuart manipulated the information available to investors regarding their investments to give them the false impression that their funds were growing and could be redeemed, when in fact this was not true.¹⁴

[14] Investors invested at least \$7.2 million in the investment program and many suffered financial and personal hardship as a result of the loss of all or some of their invested pension funds.¹⁵

⁷ RSO 1990, c S.22, s 7(2)

⁸ OSC Rules of Procedure, r 21(3)

⁹ Exhibit 1, Staff's Hearing Brief, Tab 2, Section 139 Certificate Re: Marilyn Dianne Stuart dated April 3, 2020

¹⁰ Guilty Plea Transcript at 7-8

¹¹ Guilty Plea Transcript at 8-10

¹² Guilty Plea Transcript at 8-9

¹³ Guilty Plea Transcript at 9

¹⁴ Guilty Plea Transcript at 10

¹⁵ Sentencing Transcript at 3-4

- [15] The Mutual Fund Dealers Association (**MFDA**) compensated most of the investors (as WH Stuart became insolvent and ultimately bankrupt¹⁶), but only to the original amount of their principal investment. The total loss paid out by the MFDA to the investors following the bankruptcy of WH Stuart was approximately \$7.2 million.¹⁷
- [16] On December 2, 2019, Stuart pled guilty before the Ontario Court to fraud over \$5000¹⁸ contrary to section 380(1)(a) of the *Criminal Code*.¹⁹

B. Sentencing

- [17] On December 19, 2019, Stuart was sentenced to a conditional custodial sentence of two years less a day, to be served in the community, followed by a probation period of two years.²⁰ Stuart was also ordered to pay restitution in the amount of \$1.1 million to the MFDA Investor Protection Corporation.²¹
- [18] In addition, Stuart was prohibited for twenty years from seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity, that involves having authority over the real property, money or valuable security of another person.²²
- [19] In ordering this sentence, Justice Rose noted that Stuart's conduct "caused real harm to many people and many organizations" who trusted her to take care of their investment funds and instead of doing so, she ran a Ponzi scheme.²³ Justice Rose also considered the scope of the financial loss, Stuart's position as a senior officer at WH Stuart and the sophistication and lengthy time period of the scheme.²⁴
- [20] Justice Rose found that although the overall investor loss was approximately \$7.2 million, the proven loss was only \$1.1 million.²⁵
- [21] Finally, Justice Rose also considered various mitigating factors including that: Stuart was 72 years old and had no prior criminal record; Stuart had health issues; Stuart pled guilty and accepted responsibility; and, Stuart cooperated with the investigation from the beginning, which ultimately resulted in her personal bankruptcy.²⁶

IV. LEGAL FRAMEWORK

- [22] Subsection 127(10) of the Act provides that an order may be made under s. 127(1) where a person has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or

¹⁶ Guilty Plea Transcript at 9

¹⁷ Guilty Plea Transcript at 9

¹⁸ Guilty Plea Transcript at 7

¹⁹ RSC 1985, c C-46

²⁰ Sentencing Transcript at 9 and 17

²¹ Sentencing Transcript at 16

²² Sentencing Transcript at 17

²³ Sentencing Transcript at 7

²⁴ Sentencing Transcript at 4-5

²⁵ Sentencing Transcript at 3

²⁶ Sentencing Transcript at 4-5

derivatives. If that precondition is met, the Commission must consider whether it should exercise its jurisdiction to make a protective order in the public interest.

- [23] In determining whether such an order should be made in the public interest, the Commission may consider, among other factors, the seriousness of the misconduct, the harm suffered by investors, specific and general deterrence and any aggravating or mitigating factors.²⁷ The purpose of such an order is “protective and preventative” and made to restrain potential conduct that could be detrimental to the integrity of Ontario’s capital markets and therefore prejudicial to the public interest.

V. ANALYSIS AND CONCLUSION

- [24] Stuart participated in a scheme, while she was registered with the Commission as a dealing representative, to solicit and defraud investors of their investment funds by purporting to invest their funds in guaranteed investments. I am satisfied that Stuart’s conviction arises from a course of conduct related to securities. Therefore, the precondition for an order under s. 127(1) of the Act has been met.
- [25] Stuart’s misconduct was extremely serious. Over a period of at least nine years, Stuart used her position as a registrant to solicit funds from investors, consisting primarily of retired teachers and police officers, and these investors entrusted their pension funds to her control. Stuart also manipulated the information available to investors regarding their investments to give them the false impression that their funds were growing and could be redeemed.
- [26] Fraud is one of the most egregious securities regulatory violations.²⁸ It causes direct and immediate harm to investors and significantly undermines confidence in the capital markets.
- [27] Registration is a cornerstone of securities law designed to protect investors by ensuring that those who sell or promote securities are proficient, solvent and act with integrity. Improper or fraudulent conduct by a registrant undermines investor protection and the integrity of the capital markets.
- [28] It is important that this Commission impose sanctions that will protect Ontario investors by specifically deterring Stuart from engaging in similar or other misconduct in Ontario, and by acting as a general deterrent to other like-minded persons.
- [29] Staff submits that an order permanently prohibiting Stuart from participating in Ontario’s capital markets is necessary in the circumstances. I agree that such an order is in the public interest.
- [30] For the reasons set out above, a permanent ban prohibiting Stuart from participating in the capital markets is necessary to adequately protect investors and the capital markets. I therefore order that:
- a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Stuart shall cease permanently;

²⁷ *Reeve (Re)*, 2018 ONSEC 55, (2018) 41 OSCB 9433 (**Reeve**) at para 27

²⁸ *Reeve* at para 28

- b. pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by Stuart is prohibited permanently;
- c. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Stuart permanently;
- d. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Stuart resign any positions that she holds as a director or officer of any issuer or registrant;
- e. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Stuart is prohibited permanently from becoming or acting as a director or officer of any issuer or registrant; and
- f. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Stuart is prohibited permanently from becoming or acting as a registrant or promoter.

Dated at Toronto this 3rd day of March, 2021.

"Wendy Berman"

Wendy Berman