



Capital
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Citation: *Nyadongo (Re)*, 2022 ONCMT 26
Date: 2022-09-30
File No. 2022-17

IN THE MATTER OF

**TINASHE (NASH) SYLVESTER NYADONGO AND 10194131 CANADA LTD., doing
business as FUTURE GROWTH INVESTMENTS**

REASONS AND DECISION

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

Adjudicators: Sandra Blake

Hearing: In writing; final written submissions received August 24, 2022

Appearances: Christina Galbraith For Staff of the Ontario Securities
Commission

No submissions made by or on behalf of Tinashe Sylvester
Nyadongo or 10194131 Canada Ltd.

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REASONS AND DECISION

1. OVERVIEW

- [1] Staff of the Ontario Securities Commission (**Staff**) seek an inter-jurisdictional enforcement order based on a finding of the Alberta Securities Commission (the **ASC**) that, among other things, Tinashe Sylvester Nyadongo (**Nyadongo**) and 10194131 Canada Ltd., doing business as Future Growth Investments (**Numberco**) (together, the **Respondents**) illegally distributed Numberco shares and engaged in fraudulent conduct.
- [2] For the reasons that follow, I find that it is in the public interest to make the order requested by Staff.

2. SERVICE AND PARTICIPATION

- [3] Staff elected to proceed with a hearing in writing using the expedited procedure for inter-jurisdictional enforcement proceedings set out in Rule 11(3) of the Rules of Procedure and Forms (the **Rules**).
- [4] Staff served the Respondents on August 3, 2022 with the Notice of Hearing, Statement of Allegations and Staff's Hearing Materials¹. Staff later obtained confirmation from counsel for the Respondents that service was accepted and that the Respondents did not intend to oppose the application².
- [5] I find that service was properly effected on the Respondents on or around August 3, 2022.

3. BACKGROUND FACTS

3.1 ASC Findings

- [6] The ASC made the following findings based on a filed Statement of Admissions (**Statement**)³:

¹ Exhibit 1, Affidavit of Service of Michelle Spain sworn August 2, 2022

² Exhibit 2, Supplementary Affidavit of Service of Michelle Spain sworn August 4, 2022

³ *Nyadongo (Re)*, 2022 ABASC 19 (**ASC Decision**)

- a. The misconduct occurred during the period of November 2017 to March 2019 (the **Material Time**). Nyadongo resided in Calgary. Nyadongo was a director of Numberco and its guiding mind during the Material Time. Since March 19, 2019, Nyadongo has been the sole director and officer of Numberco.
- b. The Respondents raised approximately \$1.2 million by selling shares in Numberco to approximately 28 investors, including six investors from Ontario, without filing a preliminary prospectus or prospectus, and without attempting to qualify Numberco investors for any prospectus exemption.
- c. Nineteen of the 28 investors held locked-in retirement accounts or other registered accounts (**Registered Accounts**) and wanted to “unlock” or otherwise access funds in their Registered Accounts prior to retirement (**Unlock Investors**). The Respondents deceived Unlock Investors about how their funds would be used. Among other false and misleading representations, the Respondents told Unlock Investors that Numberco would transfer a portion of the funds in the Registered Accounts to the investors and withhold the remaining balance to pay taxes. The Respondents used the withheld funds for Nyadongo’s personal use and/or for other unauthorized uses. Unlock Investors accounted for approximately \$750,000 of the total amount raised.
- d. At least \$234,000 of the \$1.2 million raised was used for Nyadongo’s personal use or benefit. A further \$440,000 was loaned to a small Calgary business owned by an acquaintance of Nyadongo. As of the date of the Statement, Numberco had no funds remaining in its bank account and all of the funds transferred to Nyadongo’s personal accounts had been spent by Nyadongo.

[7] The ASC concluded that the Respondents breached s. 110(1) of the Alberta Securities Act⁴ (the **Alberta Act**) by distributing Numberco shares without having filed and received a receipt for a preliminary prospectus or a prospectus, and, in certain cases, without an available prospectus exemption; and breached

⁴ RSA 2000, c S-4

s. 93(1)(b) of the Alberta Act by directly or indirectly engaging or participating in an act, practice, or course of conduct relating to securities that they knew or ought to have known may perpetrate a fraud on certain investors⁵.

3.2 ASC Order

[8] The ASC ordered, with respect to Nyadongo, that:

- a. under s. 198(1)(d) of the Alberta Act, he must immediately resign from any position he may hold as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;
- b. for a period of 20 years from the date of the ASC decision or until the administrative penalty set out below is paid in full, whichever is the later:
 - i. under s. 198(1)(b), he must cease trading in or purchasing any security or derivative, except that this order does not preclude Nyadongo from trading in or purchasing securities or derivatives through a registrant (who has first been given a copy of this decision and the Statement) in registered retirement savings plans, registered retirement income funds, registered education savings plans and tax-free savings accounts (each as defined in the Income Tax Act (Canada)) and locked-in retirement accounts, each for the benefit of one or more of Nyadongo, his spouse and his dependent children;
 - ii. under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;
 - iii. under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of any issuer, or other person or investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized

⁵ ASC Decision at para 6

trade repository, designated rating organization or designated benchmark administrator; and

- iv. under s. 198(l)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
- c. under s. 199, he must pay an administrative penalty of \$150,000 (the **ASC Administrative Penalty**);
- d. under s. 198(1)(i), he must disgorge and pay to the ASC the \$234,000 he obtained as a result of his non-compliance with Alberta securities laws; and
- e. under s. 202, he must pay costs in the amount of \$10,000⁶.

[9] The ASC ordered, with respect to Numberco, that:

- a. under s. 198(1)(a) of the Act, all trading in or purchasing of securities or derivatives of Numberco is prohibited;
- b. under s. 198(1)(b), Numberco must cease trading in or purchasing any securities or derivatives; and
- c. under s. 198(l)(c), all of the exemptions contained in Alberta securities laws do not apply to Numberco⁷.

4. LAW AND ANALYSIS

[10] Subsection 127(10) of the Act provides that an order may be made against a person or company that is subject to an order made by another securities regulatory authority that imposes sanctions, conditions, restrictions or requirements upon them. If that precondition is met, the Tribunal must consider whether it should exercise its jurisdiction to make a protective order in the public interest.

[11] The Respondents are subject to an order made by a securities regulatory authority, the ASC, that imposes sanctions, conditions, restrictions or

⁶ ASC Decision at para 11

⁷ ASC Decision at para 12

requirements upon them, thereby meeting the threshold set out in paragraph 4 of subsection 127(10).

- [12] Staff submits that it is in the public interest to protect Ontario investors from the Respondents by preventing or limiting their participation in Ontario's capital markets.
- [13] Additionally, while the Tribunal must make its own determination of what is in the public interest, it is important that the Tribunal be aware of and responsive to an increasingly complex and interconnected cross-border securities industry. Comity requires that there not be barriers to recognizing and reciprocating the order of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127(10) of the Act as a judgment that invokes the public interest. For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low⁸.
- [14] In determining the nature and duration of appropriate sanctions, the Tribunal may consider a number of factors⁹. Staff submits that the primary factors relevant to this case are the seriousness of the allegations proved, the need for specific and general deterrence, and the ability of a Respondent to participate without check in the capital markets. In addition, the level of activity in the marketplace, the recurrent nature of the violations, and the size of profit made from the illegal conduct are important factors¹⁰. I find that these are the relevant factors.
- [15] I conclude that the requested order is in the public interest, for the following reasons:
- a. The Respondents' conduct was fraudulent, making it among the most egregious securities regulatory violations. Such conduct causes direct and immediate harm to investors, and significantly undermines confidence in the capital markets¹¹.

⁸ *JV Raleigh Superior Holdings Inc (Re)*, 2013 ONSEC 18 at para 16

⁹ *Belteco Holdings Inc. (Re)*, (1998), 21 OSCB 7743 at 7746-7747

¹⁰ *Belteco Holdings Inc. (Re)*, (1998), 21 OSCB 7743 at 7746-7747

¹¹ *Black Panther (Re)*, 2017 ONSEC 8 at paras 48 and 68

b. The ASC Panel found that the “Respondents’ contraventions of Alberta securities laws warranted sanctions, with a view to both specific deterrence of future misconduct by the Respondents and general deterrence of others who might otherwise act similarly¹².

c. The Respondents raised at least \$1.2 million from the sale of Numberco shares. At least 28 investors lost all their investment, including six Ontario investors.

d. The Respondents have proven themselves a risk to the capital markets and investors in those markets.

4.1 Differences between the Alberta and Ontario Statutes

[16] The ASC imposed a sanction under subsection 198(1) of the Alberta Act which prohibits the Respondents from acting “in a management or consultative capacity in connection with activities in the securities market”.

[17] The Act does not use those terms. Accordingly, the sanction under subsection 198(1) of the Alberta Act is not available under subsection 127(1) of the Act or otherwise under the Act. However, the Tribunal has previously held, and I agree, that director and officer prohibitions and prohibitions on becoming or acting as a registrant or promoter, overlap considerably in substance with a prohibition on “acting in a management or consultative capacity”, and that these orders are appropriate in cases where the original order prohibits “acting in a management or consultative capacity.”¹³

5. CONCLUSION

[18] A protective order imposing conditions on the Respondents, substantially similar to those imposed by the ASC Order, is required to protect Ontario investors and Ontario’s capital markets from similar misconduct by them. I therefore issue an order in reliance on paragraph 1 of s.127(10) of the Act, that provides:

a. against Nyadongo that:

¹² ASC Decision at paragraph 8

¹³ *McClure (Re)*, 2017 ONSEC 34 at para 9; *Cook (Re)*, 2018 ONSEC 6 at para 14; *Vantooen (Re)*, 2018 ONSEC 36 at para 28-29

- i. pursuant to paragraph 2 of subsection 127(1) of the Act, Nyadongo is prohibited from trading in any securities or derivatives until February 24, 2042 or the date on which the administrative penalty ordered against Nyadongo by the ASC (the ASC Administrative Penalty) is paid in full, whichever is later, except that this order does not preclude Nyadongo from trading in or purchasing securities or derivatives through a registrant (who has first been given a copy of this Order) in registered retirement savings plans, registered retirement income funds, registered education savings plans and tax-free savings accounts (each as defined in the Income Tax Act (Canada)) and locked-in retirement accounts, each for the benefit of one or more of Nyadongo, his spouse and his dependent children;
- ii. Pursuant to paragraph 2.1 of subsection 127(1) of the Act, Nyadongo is prohibited from acquiring any securities until February 24, 2042 or the date on which the ASC Administrative Penalty is paid in full, whichever is later, except that this order does not preclude Nyadongo from trading in or purchasing securities through a registrant (who has first been given a copy of this Order) in registered retirement savings plans, registered retirement income funds, registered education savings plans and tax-free savings accounts (each as defined in the Income Tax Act (Canada)¹⁴) and locked-in retirement accounts, each for the benefit of one or more of Nyadongo, his spouse and his dependent children;
- iii. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Nyadongo until February 24, 2042 or the date on which the ASC Administrative Penalty is paid in full, whichever is later;

¹⁴ RSC 1985, c 1

- iv. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Nyadongo resign any positions he holds as a director or officer of an issuer or registrant;
 - v. pursuant to paragraph 8, 8.2 and 8.4 of subsection 127(1) of the Act, Nyadongo is prohibited from becoming or acting as a director or officer of any issuer or registrant until February 24, 2042 or the date on which the ASC Administrative Penalty is paid in full, whichever is later; and
 - vi. pursuant to paragraph 8.5 of subsection 127(1) of the Act, from becoming or acting as a registrant or promoter until February 24, 2042 or the date on which the ASC Administrative Penalty is paid in full, whichever is later.
- b. against Numberco that:
- i. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Numberco cease permanently;
 - ii. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Numberco cease permanently; and
 - iii. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Numberco permanently.

Dated at Toronto this 30 day of September, 2022

"Sandra Blake"

Sandra Blake