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Citation: *Rustulka (Re)*, 2023 ONCMT 37
Date: 2023-10-27
File No. 2023-9

**IN THE MATTER OF
KENTON ROY RUSTULKA**

REASONS AND DECISION

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

Adjudicator: James D. G. Douglas

Hearing: In Writing; final written submissions received July 21, 2023

Appearances: Vincent Amartey For Staff of the Ontario Securities
Commission

No one appearing for Kenton Roy Rustulka

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REASONS AND DECISION

1. BACKGROUND

- [1] On June 17, 2022, the Alberta Securities Commission (the **ASC**) found that Kenton Roy Rustulka contravened Alberta securities laws by:
- a. failing to comply with know-your-client and suitability obligations applicable to registrants, which contravened sections 13.2 and 13.3 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*; and
 - b. made misrepresentations to clients, contrary to s. 92(4.1) of the Alberta *Securities Act*¹ (the **Alberta Act**) (the **ASC Merits Decision**).²
- [2] On February 5, 2021, the ASC issued its decision and order on sanctions and costs (the **ASC Sanctions Decision**)³ and imposed various sanctions, restrictions and requirements on Rustulka, including market access and financial sanctions, as described more fully below.
- [3] Rustulka did not participate in the ASC merits hearing but did lead evidence and make submissions at the sanctions and costs hearing.
- [4] Staff of the Ontario Securities Commission (**Staff**) brought this inter-jurisdictional enforcement proceeding pursuant to s. 127(10) of the *Securities Act*,⁴ (the **Act**) for an order under s. 127(1) of the Act, imposing similar non-monetary sanctions upon Rustulka to those imposed by the ASC Sanctions Decision.
- [5] For the reasons that follow, I find that it is in the public interest to make an order substantially on the terms that Staff requested.

¹ RSA 2000, c S-4

² Exhibit 1, Staff's Hearing Brief, *Re Rustulka*, 2020 ABASC 93 at paras 188, 229 and 276, Tab 1

³ Exhibit 1, Staff's Hearing Brief, *Re Rustulka*, 2021 ABASC 15 at para 128, Tab 2

⁴ RSO, 1990 c S.5

2. SERVICE AND PARTICIPATION

- [6] In this proceeding, Staff elected to use the expedited procedure for inter-jurisdictional enforcement proceedings as set out in rule 11(3) of the Capital Markets Tribunal's Rules of Procedure and Forms (the **Rules**). Among other things, that procedure allows a respondent who is served with a Notice of Hearing to request an oral hearing, or to file a hearing brief and written submissions.
- [7] As is evident from the affidavit of Julia Ho,⁵ Staff served Rustulka with the Notice of Hearing, Statement of Allegations and other written materials, on April 10, 2023. I am satisfied that Staff has complied with the service obligations set out in rule 11(2).
- [8] After being served with the Notice of Hearing and Staff's materials, Rustulka requested an extension of the time to serve and file his hearing brief and written submissions. Following receipt of written submissions from the parties, I issued an order granting Rustulka until May 31, 2023, to serve and file his hearing brief and written submissions.⁶ Despite my order, Rustulka did not ultimately file any materials or otherwise participate in this hearing.
- [9] Pursuant to the *Statutory Powers Procedure Act*⁷ and the Rules, the Tribunal may proceed in the absence of a party where that party has been given adequate notice of a proceeding. I am satisfied that Rustulka received adequate notice of this proceeding and that I may proceed in his absence.

3. ANALYSIS

3.1 Introduction

- [10] Section 127(1) of the Act empowers the Tribunal to make various orders against an individual if, in the Tribunal's opinion, it is in the public interest to do so. Subsection 127(10) of the Act expressly permits an order under s. 127(1) where, amongst other qualifying criteria, a person is subject to an order made by a

⁵ Exhibit 2, Affidavit of Service of Julia Ho, Sworn April 14, 2023, at paras 2-5.

⁶ (2023), 46 OSCB 4221

⁷ RSO 1990, c S.22, s 7(2)

securities regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on them.

[11] The issues for me to consider are:

- a. whether Rustulka is subject to an order made by a securities regulatory authority, in any jurisdiction, imposing sanctions, conditions, restrictions or requirements (s. 127(10)4 of the Act);
- b. whether the principles of comity and reciprocity govern or influence whether an order pursuant to s. 127(1) of the Act would be in the public interest; and
- c. whether it is in the public interest to make the protective order requested by Staff in respect of Rustulka.

3.2 ASC Proceeding

[12] Rustulka is a resident of Alberta⁸ and has never been registered with the Ontario Securities Commission in any capacity.⁹ Rustulka was registered as an exempt market dealing representative in Alberta, British Columbia and Saskatchewan at the time of the ASC Merits Decision.¹⁰

[13] Following a hearing, the ASC found that Rustulka breached the know-your-client and suitability obligations applicable to registrants, which are found in sections 13.2 and 13.3 of National Instrument 31-103. In addition, the ASC found that Rustulka made misrepresentations to clients respecting exempt market products he recommended to them, contrary to s. 92(4.1) of the Alberta Act. These breaches took place over a period of three and a half years and involved multiple clients and numerous exempt market investment products.¹¹ The ASC found the breaches committed by Rustulka to be serious, engaging the core of its investor protection and capital markets integrity mandate.¹²

⁸ ASC Merits Decision at para 11

⁹ Exhibit 1, Staff's Hearing Brief, Section 139 Certificate Re: Rustulka dated November 10, 2021, Tab 3

¹⁰ ASC Merits Decision at para 11

¹¹ ASC Merits Decision at paras 11 and 13

¹² ASC Sanctions Decision at para 69

[14] The ASC imposed various sanctions, restrictions and requirements on Rustulka. Relevant for the purposes of this proceeding are those which collectively imposed a permanent ban on Rustulka from all capital markets participation, namely:

- a. that he immediately resign from any positions he held as a director or officer of any issuer, registration, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator; and
- b. that he is permanently prohibited from:
 - i. trading in or purchasing any security or derivative, and from relying on any exemptions contained in Alberta securities laws;
 - ii. engaging in investor relations activities;
 - iii. becoming or acting as a director or officer (or both) of any issuer or other person or company that is authorized to issue securities, or of any registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designed benchmark administrator;
 - iv. advising in securities;
 - v. becoming or acting as a registrant, investment fund manager or promoter; and
 - vi. acting in a management or consultative capacity in connection with activities in the securities market.¹³

3.3 The ASC order meets the criterion in s. 127(10)4 of the Act

[15] Paragraph 127(10)4 of the Act empowers the Tribunal to make an order under s. 127(1) where a person is subject to an order of a securities regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person. The order of the ASC made pursuant to the ASC

¹³ ASC Sanctions Decision at para 128

Sanctions Decision meets this criterion and thereby invites a consideration of whether the Tribunal should exercise its discretion to issue an order in the public interest against Rustulka under s. 127(1) of the Act.

3.4 The principles of comity and reciprocity do not govern or influence whether an order in the public interest should be made

[16] Staff argued in their written submissions that the principles of comity and reciprocity apply in the context of inter-jurisdictional enforcement proceedings. I asked Staff to provide me with judicial authority that comity and reciprocity apply in the context of an inter-jurisdictional enforcement proceeding brought pursuant to s. 127(10) of the Act, or otherwise in the context of comparable administrative proceedings. Staff were unable to provide any such authority.

[17] I am of the view that the principles of comity and reciprocity have no direct application in the context of inter-jurisdictional enforcement proceedings. As held in *Dhanani*,¹⁴ to find otherwise would effectively oust the public interest jurisdiction of the Tribunal under s. 127(1) of the Act, be contrary to the intention of the Legislature on a plain reading of the section and, borrowing from the reasons of the Supreme Court of Canada in *McLean*,¹⁵ cause the Tribunal to “abrogate its responsibility to make its own determination as to whether an order is in the public interest”. As held by the Tribunal in *Elliot*, the applicability of s. 127(10) does not automatically lead to the conclusion that an order similar to that made by the foreign jurisdiction must be made. The Tribunal must still consider whether an order in the public interest should be made and, if so, what the terms of that order should be.¹⁶

3.5 It is in the public interest to make an order substantially on the terms requested by Staff

[18] The Tribunal’s public interest jurisdiction under s. 127(1) is neither punitive nor remedial, but rather protective and prospective.¹⁷ The jurisdiction is informed by

¹⁴ *Dhanani* at paras 13-16

¹⁵ *McLean v British Columbia (Securities Commission)*, 2013 SCC 67

¹⁶ *Elliott (Re)*, 2009 ONSEC 26 at para 24 (***Elliott***)

¹⁷ *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43

the purposes of the Act set out in s. 1.1, which include protection of investors and fostering capital market integrity. Among the principles the Legislature has directed the Tribunal to have regard to when pursuing those purposes is “the sound and responsible harmonization and co-ordination of securities regulation regimes”.¹⁸ In my view, this principle is particularly applicable in the context of inter-jurisdictional enforcement proceedings.¹⁹

[19] In deciding whether to make an order in the public interest against Rustulka, I should not attempt to second guess the evidentiary findings made and legal conclusions reached by the ASC,²⁰ nor should I treat a connection to Ontario on the part of Rustulka or his conduct at issue as a prerequisite to the engagement of the Tribunal’s public interest jurisdiction.²¹

[20] Bearing in mind the foregoing and accepting the factual findings and legal conclusions of the ASC Merits Decision, I have no hesitation concluding that, had Rustulka engaged in the conduct at issue in Ontario, he would have contravened the same or similar provisions of Ontario securities law. In that regard, the requirements relating to the know-your-client and suitability obligations of registrants are identical as between Alberta and Ontario because they are found in National Instrument 31-103, which applies equally in both jurisdictions.

[21] As to the findings of the ASC regarding the misrepresentations made by Rustulka, Staff submitted that they would have led to a finding of a breach of s. 126.2(1) of the Act had they occurred in Ontario. I do not agree. The language of s. 126.2(1) of the Act is substantially the same as the language of s. 92(4.1) of the Alberta Act. Both sections require not only a finding of a misrepresentation, but also a finding that the misrepresentation “would reasonably be expected to have a significant effect on the market price or value of a security...” The latter requirement is generally referred to as the “market impact” test. Regardless, the ASC made no findings concerning the market for the various securities sold by Rustulka or the impact of his misrepresentations

¹⁸ The Act, s 2.1, at para 5

¹⁹ *USI-Tech Ltd (Re)*, 2019 ONSEC 11 at para 28 (***USI-Tech***)

²⁰ *JV Raleigh Superior Holdings Inc (Re)*, 2013 ONSEC 18 at paras 16 and 21; *USI-Tech* at para 28; *Dhanani (Re)*, 2017 ONSEC 15 at para 9

²¹ *Cook (Re)*, 2018 ONSEC 6 at para 9

thereupon. Accordingly, I am unable to conclude that Rustulka's conduct would likely have been a breach of s. 126.2(1) of the Act.

[22] Nevertheless, the findings of the ASC in respect of Rustulka's misrepresentations to investors would, in my view, have likely led to a finding by the Tribunal of a breach of s. 126.1(1)(b) of the Act.²² That section requires for a finding of breach that Rustulka's conduct in relation to the securities he sold to his clients perpetrated a fraud upon those clients. A finding of fraud requires a misrepresentation of fact, knowingly made, which induces the person to whom the misrepresentation was made to act upon it and to suffer a loss. The ASC found that Rustulka made misrepresentations of fact concerning the securities he sold to his clients,²³ that he made the misrepresentations knowingly,²⁴ that his clients purchased the securities at issue based on his misrepresentations and that his clients suffered losses in relation to the investments they made through Rustulka. These findings would, in my view, have been sufficient to support a finding by the Tribunal of a breach of s. 126.1(1)(b) of the Act had proceedings been brought in Ontario against Rustulka.

[23] Accordingly, I am satisfied that an inter-jurisdictional enforcement order as requested by Staff is warranted in the public interest of Ontario as against Rustulka.

3.6 Appropriate sanctions

[24] Having concluded that an order in the public interest against Rustulka is warranted in this case, I turn to the issue of the appropriate terms of that order.

[25] In the circumstances of this case, I find no reason to depart from the general practice of making a mirroring order that will effectively bar Rustulka from future participation in the capital markets.

²² 126.1 (1) A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,

...

(b) perpetrates a fraud on any person or company.

²³ ASC Merits Decision at paras 239-253 and 259-265

²⁴ ASC Merits Decision at paras 266-276

- [26] In reaching this conclusion, I have considered and adopt the sanctioning factors articulated in the ASC Sanctions Decision; namely, the seriousness of Rustulka's misconduct given his obligations as a registrant, the harm caused to investors and to the capital markets more generally by Rustulka's misconduct, the deliberate nature of the misrepresentations made by Rustulka to what the ASC found to be unsophisticated investors, the extended duration of Rustulka's misconduct which spanned a three and a half year period, the benefits in the form of commissions received by Rustulka as a result of his misconduct, the lack of any mitigating circumstances, and the presence of aggravating circumstances such as Rustulka's encouragement of leveraging and exploitation of his background as a police officer and a pastor.²⁵
- [27] I further agree with the finding of the ASC that, while Rustulka's assurance to them that he had no intention of ever returning to a role involving the capital markets might militate against the need for specific deterrence in his case, the need for general deterrence is significant due to the fact that registrants like Rustulka are the interface between the investing public and the capital markets and, as such, must be both knowledgeable respecting their obligations and scrupulously honest in their dealings with clients.²⁶

3.6.1 Differences between Alberta and Ontario Sanctions

- [28] While the sanctions I am ordering against Rustulka are intended to mirror those ordered by the ASC, due to differences between the Act and the Alberta Act, some of the sanctions I impose cannot be identical to those imposed by the ASC Panel. Specifically, the ASC Sanctions Decision prohibits Rustulka from "engaging in investor relations activities", "advising in securities" and "acting in a management or consultative capacity in connection with activities in the securities market." This is a sanction contained in s. 198(1) of the Alberta Act, but not in s. 127(1) of the Act.
- [29] The Tribunal has stated in past decisions that managerial and consultative activities relating to the securities market may be performed by a director or officer of an issuer or a registrant, including an adviser, an investment fund

²⁵ ASC Sanctions Decision at paras 60, 61, 63-64, 67, 69, 88-91

²⁶ ASC Sanctions Decision at para 100

manager, a promoter, or a third party consultant.²⁷ I therefore make an order preventing Rustulka from becoming or acting as a director or officer of any issuer or registrant, including as an investment fund manager or from becoming or acting as a registrant, including as an investment fund manager or promoter, thereby mirroring the ASC Sanctions Decision and Order to the extent possible under the Act.

4. CONCLUSION

[30] For the reasons set out above, I find that it is in the public interest to make an order substantially on the terms sought by Staff, taking into account the minor differences in the sanctions authorized by the Act versus those authorized by the Alberta Act. I therefore order:

- a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Rustulka cease permanently;
- b. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Rustulka 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 Rustulka permanently;
- d. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Rustulka resign any positions he holds as a director or officer of an issuer or registrant, including as an investment fund manager;
- e. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Rustulka is prohibited permanently from becoming or acting as a director or officer of any issuer or registrant, including as an investment fund manager; and

²⁷ *McClure (Re)*, 2017 ONSEC 34 at paras 8-9

- f. pursuant to paragraph 8.5 of subsection 127(1), Rustulka is prohibited permanently from becoming or acting as a registrant, including as an investment fund manager or promoter.

Dated at Toronto this 27th day of October, 2023

"James D. G. Douglas"

James D. G. Douglas