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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

– AND –

IN THE MATTER OF
JV RALEIGH SUPERIOR HOLDINGS INC.,
MAISIE SMITH (also known as MAIZIE SMITH) and INGRAM JEFFREY ESHUN

REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*)

Decision:	April 25, 2013	
Panel:	Alan J. Lenczner, Q.C.	- Commissioner and Chair of the Panel
Submissions:	Sylvia Schumacher	- For Staff of the Ontario Securities Commission

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REASONS AND DECISION

I. BACKGROUND

[1] This was a hearing, in writing, before the Ontario Securities Commission (the "**Commission**") pursuant to subsections 127(1) and (10) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order imposing sanctions against JV Raleigh Superior Holdings Inc. ("**JV Raleigh**"), Maisie Smith, also known as Maizie Smith, ("**Smith**") and Ingram Jeffrey Eshun ("**Eshun**") (collectively, the "**Respondents**").

[2] A Notice of Hearing was issued by the Commission on February 22, 2013 (the "**Notice of Hearing**"), in relation to a Statement of Allegations filed by Staff of the Commission ("Staff") on February 15, 2013 (the "**Statement of Allegations**").

[3] Staff relies on the decisions of the British Columbia Securities Commission ("**BCSC**") dated July 27, 2012 (*Re JV Raleigh Superior Holdings et al*., 2012 BCSECCOM 301 ("**BCSC Merits Decision**")) and December 24, 2012 (*Re JV Raleigh Superior Holdings et al*., 2012 BCSECCOM 492 ("**BCSC Order**")). The BCSC found that between July 2006 and January 2009 (the "**Material Time**") the Respondents engaged in unregistered trading in breach of section 34 and an illegal distribution in breach of section 61 of the British Columbia *Securities Act,* R.S.B.C. 1996, c. 418 (the "**BC Act**") and that Smith and Eshun, as officers and directors of JV Raleigh, authorized, permitted or acquiesced in breaches of the BC Act by JV Raleigh. The BCSC Order imposed sanctions against the Respondents.

[4] In this written hearing, I have to decide whether the Respondents are subject to an order made by a securities regulatory authority in British Columbia that imposes sanctions on each of the respondents and whether it is in the public interest to make a reciprocal order in Ontario.

II. PRELIMINARY ISSUES

A. Written Hearing

[5] The Respondents were all served with the Notice of Hearing and Statement of Allegations. JV Raleigh and Smith did not appear on the return date of March 6, 2013, were not represented and, indeed, made no response of any kind. Eshun responded by email indicating that he was out of the country, that he intended to engage counsel and requested an adjournment until April 15, 2013.

[6] Rule 11 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "*OSC Rules of Procedure"*) permits the Commission to conduct a proceeding by means of a written hearing. On March 6, 2013, the panel heard an application by Staff to convert the matter to a written hearing, in accordance with Rule 11.5 of the *OSC Rules of Procedure* and subsection 5.1(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"). On that date, the panel also considered the adjournment request made via email by Eshun, pursuant to Rule 9.2 of the *OSC Rules of Procedure*.

On March 6, 2013 the panel issued an order which established a schedule for filing materials and permitted the Respondents the opportunity to object to the written hearing application on the date suggested by Eshun, April 15, 2013.

[7] On April 3, 2013, the Commission received email correspondence from Eshun requesting a further adjournment and on April 4, 2013 the panel dismissed his request and ordered that a hearing take place on April 15, 2013 for the sole purpose of determining whether the matter would proceed in writing. On April 15, 2013, Staff appeared and made submissions, but none of the Respondents appeared or made submissions. On that date, the panel granted Staff's application to conduct this hearing in writing, pursuant to Rules 11.4 and 11.5 of the *OSC Rules of Procedure* and provided the Respondents with an opportunity to serve and file a response by April 22, 2013.

B. Failure of the Respondents to Participate

[8] None of the Respondents filed evidence or made submissions. Subsection 7(2) of the SPPA authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing. The provision states:

> **[7**.](2) Where notice of a written hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (4) (b) [to provide good reason for not holding a written hearing] nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

[9] I am satisfied that Staff served all Respondents with the Notice of Hearing, Statement of Allegations and disclosure as evidenced by the Affidavits of Service of Lee Crann sworn February 28, 2013 and March 12, 2013. I also note that the Notice of Hearing and the Statement of Allegations were posted on the Commission's website, as were the Commission orders which set out the dates for service and filing of materials. I am therefore authorized to proceed in the absence of the Respondents in accordance with subsection 7(2) of the SPPA.

III. THE BRITISH COLUMBIA SECURITIES COMMISSION ORDER

[10] Staff relies upon paragraph 4 of subsection 127(10) of the Act to reciprocate the BCSC Order and to impose sanctions against the Respondents pursuant to paragraphs 2, 2.1, 7, 8, 8.1, 8.2 and 8.5 of subsection 127(1) of the Act.

[11] The BCSC Order imposes the following sanctions on the Respondents:

> **Eshun**
>
> 1. under section 161(1)(b) of the [BC] Act, that Eshun permanently cease trading in, and be permanently prohibited from purchasing, securities and exchange contracts;

2. under sections 161(1)(d)(i) and (ii), that Eshun resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

3. under section 161(1)(d)(iii), that Eshun is permanently prohibited from becoming or acting as a registrant or promoter;

4. under section 161(1)(d)(iv), that Eshun is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

5. under section 161(1)(d)(v), that Eshun is permanently prohibited from engaging in investor relations activities;

6. under section 161(1)(g), that Eshun pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC] Act, which we find to be not less than $5.7 million;

7. under section 162, that Eshun pay an administrative penalty of $750,000;

Smith

8. under section 161(1)(b) of the [BC] Act, that Smith permanently cease trading in, and be permanently prohibited from purchasing, securities and exchange contracts, except she may trade and purchase securities and exchange contracts through accounts in her own name at one registered dealer, provided that she gives a copy of this decision to the registered dealer;

9. under sections 161(1)(d)(i) and (ii), that Smith resign any position she holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

10. under section 161(1)(d)(iii), that Smith is permanently prohibited from becoming or acting as a registrant or promoter;

11. under section 161(1)(d)(iv), that Smith is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

12. under section 161(1)(d)(v), that Smith is permanently prohibited from engaging in investor relations activities;

13. under section 161(1)(g), that Smith pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC] Act, which we find to be not less than $5.7 million;

14. under section 162, that Smith pay an administrative penalty of $500,000;

JV Raleigh

15. under section 161(1)(b), that all persons permanently cease trading in, and be prohibited from purchasing, securities of JV Raleigh;

16. under section 161(1)(g), that JV Raleigh pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC] Act, which we find to be not less than $5.7 million; and

Maximum disgorgement

17. the aggregate amount paid to the Commission under paragraphs 6, 13, and 16 not exceed the greater of $5.7 million and the actual amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC] Act.

(BCSC Order, *supra* at para. 45)

III. LAW AND ANALYSIS

A. Subsection 127(10) of the Act

[12] Staff relies upon the inter-jurisdictional enforcement provisions of the Act, specifically paragraph 4 of subsection 127(10) of the Act and seeks an order from the Commission imposing similar sanctions and terms as were made against the Respondents by the BCSC.

[13] Subsection 127(1) of the Act provides:

> The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders […]

[14] Subsection 127(10) of the Act provides:

> Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exists:
>
> […]
>
> 4. the person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.

[15] From a review of the BCSC Merits Decision and BCSC Order, I am satisfied that the BCSC had both personal jurisdiction and subject-matter jurisdiction over the

Respondents. I am also satisfied that the requirements of paragraph 4 of subsection 127(10) of the Act have been met. The BCSC, a securities regulatory authority, has made orders that impose sanctions and restrictions on each of the Respondents.

[16] What is left to be determined is whether it is in the public interest in Ontario for a reciprocal order to be made against these Respondents. The decision of a foreign jurisdiction stands as a determination of fact for the purpose of the Commission's considerations under subsection 127(10) of the Act. The Commission's task is then to determine whether, based on those findings of fact, the sanctions proposed by Staff would be in the public interest in Ontario. An important factor to consider is, if the facts had occurred in Ontario, whether the respondent's conduct would have constituted a breach of the Act and been considered to be contrary to the public interest, such that it would attract the same or similar sanctions.

[17] As decided by the Supreme Court of Canada (the "**SCC**"), the purpose of an order under section 127 of the Act is protective and prospective. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The SCC went on to state that "the role of the OSC under s. 127 is to protect the public interest by removing from capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets" (*Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 43; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600).

B. Relevant BCSC Findings

[18] I note from the BCSC Merits Decision the following:

> ¶ 5 JV [Raleigh] is a British Columbia company. Smith and Eshun incorporated it and were its sole directors during the relevant period. Each owned 50% of its shares. Smith is a resident of British Columbia.
>
> ¶ 6 JV [Raleigh] entered into agreements with the 81 investors. The agreements were titled "Loan Agreement". Under the loan agreements, the investors advanced funds to JV [Raleigh] in consideration for which JV [Raleigh] promised to use the funds for "purchasing consumer secured notes receivables." The agreements described the notes as follows: "these notes typically have a high yield. This is a form of factoring." There is no evidence that JV [Raleigh] used any of the funds for this purpose.
>
> ¶ 7 The loan agreements provided for monthly payments as a return of capital, a maturity date, and an "interest bonus payment". Nearly all of the loan agreements were signed on JV[Raleigh]'s behalf by Smith. There is no evidence that any investors received a return of capital or any interest.
>
> ¶ 8 JV [Raleigh] deposited the investors' advances under the loan agreements to bank accounts opened by Smith and Eshun. both had individual authority to withdraw funds from the accounts, and both did so. Eshun signed four cheques made payable to himself totalling $150,000. In closing a JV [Raleigh] credit union account, Smith received a bank draft in the amount of $2.7 million.

[…]

¶ 10 None of the respondents was registered under the Act, nor did JV [Raleigh] file a prospectus, during the relevant period.

[…]

¶ 24 Based on the findings above, as well as, in the case of JV [Raleigh] and Smith, the statement of admissions, we find that JV[Raleigh], Smith and Eshun traded in securities without being registered to do so, contrary to section 34 of the [BC] Act, and distributed those securities without filing a prospectus, contrary to section 61 of the [BC] Act, when they distributed JV [Raleigh] securities for proceeds of $5.7 million.

¶ 25 Smith and Eshun were JV[Raleigh]'s only two directors. Based on the conduct described above, we find that they authorized, permitted or acquiesced in JVR's contraventions of sections 34 and 61 of the [BC] Act. We find that they also contravened sections 34 and 61 under section 168.2 of the [BC] Act.

(BCSC Merits Decision, *supra* at paras. 5-8, 10, 24 and 25)

[19] I also note from BCSC Order that:

¶ 7 We found that the respondents distributed securities for proceeds of $5.7 million without complying with the registration and prospectus requirements of the Act. In doing so, they engaged in the serious misconduct described in *Corporate Express.*

¶ 8 In addition to the inherent seriousness of a contravention of sections 34 and 61(1), there is no evidence that JV Raleigh used any of the funds to purchase "consumer secured notes receivables", or to invest in any form of factoring, as JV Raleigh promised in its loan agreements with the investors. To the contrary, it appears that investors' funds were withdrawn from JV Raleigh and given to companies of which Eshun and Smith were directors and officers.

[…]

¶13 The respondents raised $5.7 million and produced no records to show how it was spent. They have no evidence to show that any of it was spent in the manner promised in the loan agreements. In these circumstances, it is reasonable to conclude that the respondents were enriched to the extent of the entire amount they raised from investors.

¶ 14 At a minimum, we know, as we found, that Eshun signed four cheques payable to him totalling about $150,000.

¶ 15 We also know that money was transferred out of JV Raleigh's accounts to entities associated with Smith and Eshun:

- $1.9 million to Trem DY Group Inc., of which Eshun is president and a director
- $1.5 million to DSC Lifestyle Services, of which Eshun is president and a director

- $370,000 to 0747940 BC Ltd., of which Smith is sole director (the payments included those related to shareholder loans and management fees)
- $234,426 to Siboco Marketing Inc., of which Eshun and Smith are sole directors.

[…]

¶ 24 There is evidence of significant harm to investors. The respondents raised over $5.7 million form 81 investors, 49 of whom were residents of British Columbia who invested $3.2 million. There is no market for the securities the investors purchased, nor is there any evidence that their investments have any present or future value.

¶ 25 The executive director entered affidavits of investors from British Columbia. They suffered significant harm:

- a nurse lost over $75,000 and now works two jobs to pay the mortgage on her home she used to raise the funds to invest
- a hospital technician lost over $100,000, funded by mortgaging her home
- a hotel room attendant lost $50,000, funded by mortgaging her home
- a forklift operator lost $40,000, funded by mortgaging his home, and has since as a result been forced to sell his home
- a homecare worker lost nearly $160,000, funded by mortgaging her home
- a couple (the wife a dietary aid worker and the husband a shipper/receiver) lost $196,000, using a home equity loan and their daughter's education fund; they are not unable to fund their daughter's education and expect to have to sell their home to pay off the loan
- a retiree lost $49,000 from her RRSP savings
- a nurse lost $218,000, funded by mortgaging her home; her retirement plans are significantly curtailed
- a grocery store cashier lost over $275,000, funded by mortgaging her home and using the funds in her RRSP; she has no retirement savings left.

[…]

¶ 28 Eshun has a regulatory history. He admitted to the Manitoba Securities Commission in 2004 that he illegally traded securities without being registered and without filing a prospectus and was sanctioned.

¶ 29 Eshun is president and a director of GDC Investments Inc. GDC was cease-traded by the executive director in 2010 for attempting to distribute securities under an offering memorandum that did not comply with the [BC] Act.

[…]

¶ 31 The respondents have shown no contrition. Smith and JV Raleigh have acknowledged, through their counsel's submissions, that their contraventions are serious, but there is no evidence before us that would give us any comfort that they intend to alter their behaviour so as to remove any concern about the risk of their future misconduct in our

> capital markets. In our opinion, the respondents pose a serious risk to our capital market were they to be allowed to participate in them in any meaningful way.

(BCSC Order, *supra* at paras. 7, 8, 13-15, 24, 25, 28, 29 and 31)

C. Appropriate Sanctions

[20] In my view, the conduct of the Respondents described above was abusive of the capital markets fully warranting the sanctions imposed by the BCSC. Had such conduct occurred in Ontario, it would have constituted contraventions of the Act in Ontario. Given the past conduct, the lack of contrition, the absence of mitigating factors and the total failure to provide any rational explanation, it is clearly appropriate to make an order in the public interest to prevent the Respondents from accessing the capital markets in Ontario.

[21] The threshold for determining whether it is in the public interest to reciprocate an order from another regulatory authority is a low threshold. I acknowledge the British Columbia Court of Appeal's decision in *Lines* that concluded the BCSC must make its own determination of what is in the public interest in British Columbia "rather than make an order *automatically*, based on the order of the foreign jurisdiction" [emphasis in original] (*Lines v. British Columbia (Securities Commission)* (2012) BCCA 316, at para. 31). Nevertheless, it is also important that the Commission be aware of and responsive to an increasingly complex and interconnected cross-border securities industry. For some time, the courts have been attuned to the needs of business and interprovincial comity.

[22] In 1990, the SCC expounded new principles and a new approach to the recognition and enforcement of judgments between Canadian provinces. The SCC stated:

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.
>
> (*Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135, ("***Morguard***") at para. 34)

[23] The SCC determined the issue in this way:

> As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments -- in the case of

judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

(*Ibid*. at para. 43)

[24] Thirteen years later, in 2003, the SCC revisited the issue of recognition and enforcement of foreign judgments, including those from other countries. The SCC stated:

> The importance of comity was analysed at length in *Morguard, supra*. This doctrine must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility. The doctrine of comity is:
>
> > grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
> >
> > (*Morguard, supra*, at p. 1096)
>
> This doctrine is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although *Morguard* recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 *Can. Bus. L.J.* 373, at p. 375).
>
> […]
>
> Like comity, the notion of reciprocity is equally compelling both in the international and interprovincial context. La Forest J. discussed interprovincial reciprocity in *Morguard, supra*. He stated (at p. 1107):
>
> > ... if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment.
>
> In light of the principles of international comity, La Forest J.'s discussion of reciprocity is also equally applicable to judgments made by courts outside Canada. In the absence of a different statutory approach, it is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test.
>
> (*Beals v. Saldanha*, [2003] S.C.J. No. 77, ("***Beals***") at paras. 27 and 29)

[25] Most provinces now have legislation whereby judgments rendered in one common law province will be enforced in another common law province by the simple act of registration (*Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5).

[26] Although the application of subsection 127(10) of the Act does not involve the direct enforcement of a foreign judgment, the principles of comity and reciprocity espoused in *Morguard* and in *Beals*, underlying the enforcement of interprovincial and foreign judgments should equally apply to provincial securities regulators. I acknowledge that the Commission's orders in the public interest involve more than monetary judgment enforcement. The Commission has the authority to impose a number of market prohibitions on the Respondents, only when it is in the public interest to do so. Comity requires that there not be barriers to recognizing and reciprocating the orders 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 low. The onus will rest with the Respondents to show that there was no substantial connection between him/her and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction.

IV. CONCLUSION

[27] For the reasons above stated, it is in the public interest to issue the following orders:

1. against JV Raleigh that pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of JV Raleigh cease permanently;

2. against Smith that:

   (a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Smith cease permanently, except that she may trade and purchase securities and exchange contracts through accounts in her own name at the registered dealer referred to in the order of BCSC Order, provided she gives a copy of the BCSC Order to that dealer;

   (b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Smith cease permanently, except that she may trade and purchase securities and exchange contracts through accounts in her own name at the registered dealer referred to in the order of BCSC Order, provided she gives a copy of the BCSC Order to that dealer;

   (c) pursuant to paragraph 7 of subsection 127(1) of the Act, Smith resign any positions that she holds as director or officer of an issuer;

   (d) pursuant to paragraph 8 of subsection 127(1) of the Act, Smith be prohibited permanently from becoming or acting as director or officer of an issuer;

(e) pursuant to paragraph 8.1 of subsection 127(1) of the Act, Smith resign any positions that she holds as director or officer of a registrant;

(f) pursuant to paragraph 8.2 of subsection 127(1) of the Act, Smith be prohibited permanently from becoming or acting as a director or officer of a registrant; and

(g) pursuant to paragraph 8.5 of subsection 127(1) of the Act, Smith be prohibited permanently from becoming or acting as a registrant or as a promoter; and

3. against Eshun that:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Eshun cease permanently;

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Eshun cease permanently;

(c) pursuant to paragraph 7 of subsection 127(1) of the Act, Eshun resign any positions that he holds as director or officer of an issuer;

(d) pursuant to paragraph 8 of subsection 127(1) of the Act, Eshun be prohibited permanently from becoming or acting as director or officer of an issuer;

(e) pursuant to paragraph 8.1 of subsection 127(1) of the Act, Eshun resign any positions that he holds as director or officer of a registrant;

(f) pursuant to paragraph 8.2 of subsection 127(1) of the Act, Eshun be prohibited permanently from becoming or acting as a director or officer of a registrant; and

(g) pursuant to paragraph 8.5 of subsection 127(1) of the Act, Eshun be prohibited permanently from becoming or acting as a registrant or as a promoter.

Dated at Toronto this 25th day of April, 2013.

"Alan Lenczner"

Alan J. Lenczner, Q.C.