Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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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
DAVID DE GOUVEIA

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

Hearing:	In writing	
Decision:	April 24, 2014	
Panel:	Alan J. Lenczner, Q.C.	- Commissioner and Chair of the Panel
Submissions:	Donna E. Campbell	- For Staff of the Commission

TABLE OF CONTENTS

REASONS AND DECISION

I. OVERVIEW

A. Background

[1] This was a written hearing before the Ontario Securities Commission (the "**Commission**"), pursuant to subsections 127(1) and 127(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 David De Gouveia (the "**Respondent**" or "**Gouveia**"[1]).

[2] A Notice of Hearing was issued by the Commission on February 18, 2014, in connection with a Statement of Allegations that was filed by Staff of the Commission ("**Staff**") on the same day against the Respondent.

[3] Staff relies on the decisions of the Alberta Securities Commission (the "**ASC**") dated March 13, 2013 (*Re De Gouveia*, 2013 ABASC 106 (the "**ASC Merits Decision**")) and June 6, 2013 (*Re De Gouveia*, 2013 ABASC 249 (the "**ASC Sanctions Decision**)). The ASC found that Gouveia engaged in market manipulation from November 2008 to April 2009 (the "**Relevant Period**") and, in doing so, breached subsection 93(a) of the Alberta *Securities Act*, R.S.A. 2000, c. S-4, as amended (the "**Alberta Act**"), and acted contrary to the public interest.

[4] Staff relies upon paragraph 4 of subsection 127(10) of the Act to reciprocate the ASC Sanctions Decision to impose sanctions against the Respondent, pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act.

[5] In this written hearing, I have to decide whether the Respondent is subject to an order made by a securities regulatory authority, namely the ASC, that imposes sanctions, conditions, restrictions or requirements on the Respondent, and whether it is in the public interest to make a reciprocal order in Ontario.

II. PRELIMINARY ISSUES

A. Written Hearing

[6] Rule 11 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "***Rules of Procedure***") permits the Commission to conduct a proceeding by means of a written hearing. On March 19, 2014, the Commission held a hearing, at which Staff requested the matter be converted to a written hearing, in accordance with Rule 11.5 of the *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**").

[7] Staff filed the Affidavit of Service of Lee Crann, sworn March 17, 2014, evidencing service of the Notice of Hearing, the Statement of Allegations and disclosure, consisting of a copy of the ASC Merits Decision and the ASC Sanctions Decision. The affidavit was entered as Exhibit 1 at

[1] I have referred to the Respondent as "Gouveia", a usage that the Panel at the Alberta Securities Commission (the "**ASC Panel**") understood that he himself follows.

the hearing on March 19, 2014. I found that Gouveia, who was not present at the hearing, was properly served with notice of the hearing. On March 19, 2014, I granted Staff's application to proceed by way of written hearing and set a schedule for the service and filing of the parties' written materials regarding the written hearing in this matter (*Re David De Gouveia* (2014), 37 O.S.C.B. 3086 (the "**March 2014 Order**")).

B. Failure of the Respondent to Participate

[8] Rule 7.1 of the Commission's *Rules of Procedure* permits the Panel to proceed in a party's absence and the party is not entitled to any further notice in the proceeding, if a Notice of Hearing was served on the party and the party does not attend the hearing. 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 a written hearing and the party does not attend the hearing.

[9] Along with filing the Affidavit of Service of Lee Crann, sworn March 17, 2014, mentioned in paragraph 7 above, Staff also filed the Affidavit of Service of Lee Crann, sworn April 2, 2014, demonstrating service of the March 2014 Order, Staff's written submissions, its brief of authorities and its hearing brief in respect of the written hearing in this matter. In addition, the affidavit evidenced service of a set of instructions on how the Respondent could access cases contained within the Commission's Book of Authorities. The March 2014 Order permitted the Respondent to serve and file responding materials to Staff's written materials no later than April 22, 2014. The Respondent did not file evidence or make submissions.

[10] I am satisfied that Staff served the Respondent with the Notice of hearing, the Statement of Allegations and disclosure, as evidenced by the Affidavits of Service of Lee Crann, sworn March 17 and April 2, 2014. I note that the Notice of Hearing, the Statement of Allegations and the March 2014 Order have been posted and made available to the public on the Commission's website. I am therefore authorized to proceed in the absence of the Respondent, in accordance with subsection 7(2) of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure*.

III. THE ASC MERITS DECISION AND THE ASC SANCTIONS DECISION

[11] On March 13, 2013, the ASC Panel issued the ASC Merits Decision in relation to the allegations against Gouveia. The ASC Panel made the following findings and conclusions:

> [128] …Gouveia engaged in acts, practices and a course of conduct relating to a security (Magellan Shares) that he knew or ought reasonably to have known resulted in or contributed to both (i) a false or misleading appearance of trading activity in Magellan Shares, and (ii) an artificial price for Magellan Shares. The alleged breaches of section 93(a) of the [Alberta Act] are proved.
>
> [129] The capital market is the forum in which market participants can implement investment decisions founded on their respective understandings and assessments of the information available. Indications that another, or multiple other, market participants are interested in buying or selling a particular security at a particular time, at a particular price and in a particular volume will form a part – a potentially crucial part – of the informational backdrop to trading and investment decisions, and thus to the operation of the market as a whole.

> [130] The efficiency and fairness of the capital market are impaired when such key information is distorted. Market participants who base their investment decisions, to any degree, on such distorted information are placed at an unfair disadvantage.
>
> [131] Clearly, therefore, Gouveia's improper and illegal trading activity was contrary to the public interest. We so find.
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> (ASC Merits Decision, *supra* at paras. 128-131)

[12] On June 6, 2013, the ASC Panel released the ASC Sanctions Decision. The ASC Panel summarized some of the factual background and findings from the ASC Merits Decision as follows:

> [4] Gouveia, a Calgary resident, took an interest in the stock market in 2005 and began trading through an online brokerage account (the first of several accounts he would open) in 2006. He also became an active commenter on stocks and trading, on an Internet "bulletin board" website.
>
> [5] In mid-2008 Gouveia contacted the chief executive officer (the **CEO**) of Magellan, a Vancouver-headquartered junior gold mining company whose Magellan Shares were publicly traded. In the course of several conversations, Gouveia struck the CEO as "very knowledgeable and aggressive". Magellan and its CEO were receptive to Gouveia's suggestion that he could help spread the company story, through supposed personal contacts and by posting comments on the Internet. To this end, by a November 2008 agreement Magellan formally engaged Gouveia as a "corporate advisor", his remuneration taking the form of options (**Magellan Options**) to buy Magellan Shares, exercisable in tranches at intervals from February 2009 to May 2010.
>
> [6] Gouveia did not have the personal contacts or business sophistication he claimed. At the time, he was working on oil rigs, with periodic breaks when he would return home and apply himself to the stock market. Still, he took seriously his engagement by Magellan and continued to impress Magellan's CEO with a façade of knowledge.
>
> [7] Gouveia traded, at times furiously, in Magellan Shares – on 70% of the trading days during the Relevant Period placing, amending and cancelling trading (buy or sell) orders, sometimes mere minutes or seconds apart. An expert witness noted in the Merits Hearing that Gouveia repeatedly:
>
> - both bought and sold Magellan Shares on the same day – "normally selling . . . at prices lower than he had paid", or selling and then buying at a higher price;
>
> - sold Magellan Shares "multiple times on some days", and "regardless of the profit or loss implications";

- "flattened" his holdings of Magellan Shares – selling all the shares he had amassed in prior purchases, rather than building his position;

- engaged in "wash trades" – 12 were identified – in which he was both buyer and seller;

- bought mostly (77% of his purchases) on upticks (at a price higher than the preceding trade on the market) and sold generally at a loss;

- bought at the highest price for the day – in several instances, setting the closing price for the trading day; and

- executed trades at the highest price for the particular month – doing this in five of the six months of the Relevant Period (and thereby set the monthly closing price once, not five times as the Merits Decision incorrectly indicated).

[8] Troubling aspects of Gouveia's trading in Magellan Shares were spotted and brought to his attention during the Relevant Period, culminating in March 2009 when his brokerage firm at the time, after an internal investigation, effectively fired him as a client. Gouveia responded by opening new brokerage accounts elsewhere and resuming similar trading patterns.

[9] Gouveia exercised all his Magellan Options and sold the resulting Magellan Shares at a profit totalling some $122 000.

[10] Gouveia did not deny that his trading had some unusual characteristics, but he attributed these to a combination of ignorance, impatience, naiveté and simple error. He maintained that his trading was motivated by a genuine investment intent – essentially what he told his first brokerage firm when it questioned him – to profitably accumulate Magellan Shares.

[11] The evidence did not support such explanation, and we rejected it. We found that Gouveia knew or reasonably ought to have known that his impugned trading would result in or contribute to a false or misleading appearance of trading activity in, and an artificial price for, Magellan Shares. As such, we found that he had breached section 93(a) of the [Alberta Act] and acted contrary to the public interest.

[Emphasis in original]

(ASC Merits Decision, *supra* at paras. 4-11)

[13] The ASC Sanctions Decision imposes the following sanctions and costs orders on Gouveia:

- under section 198(1)(b) of the [Alberta Act], Gouveia must cease trading in or purchasing any securities or exchange contracts, for 10 years to and including 6 June 2023;

- under section 199, he must pay an administrative penalty of $75 000; and
- under section 202, he must pay $60 000 of the costs of the investigation and hearing.

(ASC Sanctions Decision, *supra* at para. 63)

[14] Staff relies on the inter-jurisdictional enforcement provisions in subsection 127(10) of the Act in requesting that a protective order be issued against the Respondent in the public interest. Specifically, Staff requests that Gouveia cease trading in securities until June 6, 2023, pursuant to paragraph 2 of subsection 127(1) of the Act, and that Gouveia be prohibited from acquiring any securities until June 6, 2023, pursuant to paragraph 2.1 of subsection 127(1) of the Act.

IV. THE LAW

[15] When exercising the public interest jurisdiction under section 127 of the Act, I must consider the purposes of the Act. These purposes are set out in section 1.1 of the Act and are as follows:

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets.

[16] In pursuing the purposes of the Act, the Commission must have regard to the principles described in section 2.1 of the Act, namely that the primary means for achieving the purposes of the Act are:

i. requirements for timely, accurate and efficient disclosure of information,

ii. restrictions on fraudulent and unfair market practices and procedures, and

iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[17] The Supreme Court of Canada has described the Commission's public interest jurisdiction as follows:

> …the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the [Commission] under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.
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> (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 43)

[18] Paragraph 4 of subsection 127(10) of the Act provides as follows:

> **127(10) Inter-jurisdictional enforcement –** 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 exist:
>
> […]
>
> 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.
>
> […]

[19] If I am satisfied that the requirements under paragraph 4 of subsection 127(10) of the Act are met, I may make a protective order in the public interest under subsection 127(1) of the Act.

[20] The Commission has concluded that an order can be made against a Respondent, pursuant to the Commission's public interest jurisdiction under section 127 of the Act, "on the basis of decisions and orders made in other jurisdictions", if it is necessary "to protect investors in Ontario and the integrity of Ontario's capital markets" (*Re Euston Capital Corp.* (2009), 32 O.S.C.B. 6313 at para. 46).

[21] When making an order in the public interest, pursuant to subsection 127(10) of the Act, the Commission has provided that:

> 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.
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> (*Re JV Raleigh Superior Holdings Inc.* (2013), 36 O.S.C.B. 4639 ("***Re JV Raleigh***") at para. 16)

[22] The Commission has been aware of and responsive to an increasingly complex and interconnected cross-border securities industry. Accordingly, the Commission has held that for comity to be effective and the public interest to be protected, the threshold for reciprocity must be low (*McLean v. British Columbia (Securities Commission)*, [2013] S.C.J. No. 67 at paras. 15 and 51; *Re JV Raleigh*, *supra* at paras. 21-26; *Re New Futures Trading International Corp.* (2013), 36 O.S.C.B. 5713 at paras. 22-27).

[23] General deterrence is an important factor in imposing sanctions. The Supreme Court of Canada has stated that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60). The Commission will also consider the specific circumstances of each case and ensure that sanctions are proportionate to those circumstances (*Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 ("***Re M.C.J.C. Holdings***") at 1134). Sanctions must be fair and proportional to the misconduct of a respondent.

[24] In determining the nature and duration of the appropriate sanctions to impose on the Respondent, I must consider all the relevant facts and circumstances before me, including:

(a) the seriousness of the allegations proved;

(b) the respondents' experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) the size of any profit (or loss avoided) from the illegal conduct;

(e) the restraint any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(f) the size of any financial sanction or voluntary payment;

(g) the remorse of the respondent; and

(h) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746; *Re M.C.J.C. Holdings Inc.* (2002), *supra* at 1134-1136)

IV. ANALYSIS

[25] As a result of the ASC Sanctions Decision, Gouveia is subject to trading and acquisition bans of securities for 10 years, up to and including June 6, 2023. He is also subject to pay an administrative penalty of $75,000 and a costs order of $60,000.

[26] I find that Gouveia is subject to an order made by a securities regulatory authority, being the ASC, that imposes sanctions, conditions, restrictions or requirements on him, thereby meeting the threshold criteria set out in paragraph 4 of subsection 127(10) of the Act. As such, I may make an order under subsection 127(1) of the Act in this matter if I consider it in the public interest to do so.

[27] I agree with the conclusion of the ASC Panel, which found that manipulative trading, such as the trading engaged by Gouveia, "undermines the integrity of the capital market", it is "unfair to investors" and it "jeopardizes the confidence in the capital market on which legitimate investor interest and capital formation depend" (ASC Sanctions Decision, *supra* at para. 28).

[28] I note that the ASC Panel also found that Gouveia's misconduct "[e]xposed market participants to direct financial harm as a result of misinformed investment decisions…[m]ore generalized harm to investor confidence and market integrity is also foreseeable; the potential for harm was widespread" (ASC Sanctions Decision, *supra* at para. 30). As such, I agree with the ASC Panel in its finding that Gouveia presents a risk of future harm to investors and the capital market, and I therefore find that it is appropriate to make a protective order under subsection 127(1) of the Act.

[29] Having regard to the factors that are summarized in paragraph 24 above, I consider the following facts and circumstances to be of particular relevance:

- Gouveia was found by the ASC Panel to have breached Alberta securities law;
- the ASC Panel found that Gouveia's behaviour was the behaviour of an "alert, observant and active trader willingly sending price signals not prompted by a bona fide investment motivation" (ASC Merits Decision, *supra* at para. 118);
- the ASC Panel found that Gouveia's trading behaviour resulted in or contributed to artificial prices for Magellan Shares and, had such conduct occurred in Ontario, I find that Gouveia's conduct would have constituted a contravention of the Act;
- the ASC Panel imposed multiple sanctions against Gouveia, including 10-year trading and acquisition bans in securities; and
- in my view, the Respondent has not expressed remorse and there are no mitigating factors or circumstances.

[30] Based on the foregoing, I conclude that it is in the public interest to make an order under subsection 127(1) of the Act to prevent the Respondent from accessing the capital markets in Ontario and to protect these markets and investors in Ontario.

VII. CONCLUSION

[31] For the reasons stated above, I conclude that it is in the public interest to make an order under subsection 127(1) of the Act. An order will be issued that will impose the following sanctions on the Respondent:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Gouveia shall cease up to and including June 6, 2023; and

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by Gouveia shall be prohibited up to and including June 6, 2023.

DATED at Toronto this 24th day of April, 2014.

"Alan J. Lenczner"

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Alan J. Lenczner, Q.C.