Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
22nd Floor
20 Queen Street West
Toronto ON M5H 3S8
22e étage
20, rue queen ouest
Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF
IAC – INDEPENDENT ACADEMIES INC., MICRON SYSTEMS INC.
THEODORE ROBERT EVERETT and ROBERT H. DUKE

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

Decision:	June 26, 2015		
Panel:	Christopher Portner	-	Commissioner
Counsel	Keir D. Wilmut Naila Ruba	-	For Staff of the Commission

TABLE OF CONTENTS

REASONS AND DECISION

I. INTRODUCTION

[1] Staff of the Ontario Securities Commission (the "**Commission**") seek an order pursuant to subsection 127(1) and paragraph 4 of subsection 127(10) of the *Securities Act*, R.S.O. 1990, c. S. 5, as amended (the "**Act**") imposing sanctions on IAC - Independent Academies Canada Inc. ("**IAC**"), Micron Systems Inc. ("**Micron**"), Theodore Robert Everett ("**Everett**") and Robert H. Duke ("**Duke**" and, collectively with IAC, Micron and Everett, the "**Respondents**") based on two decisions of the British Columbia Securities Commission (the "**BCSC**") relating to the Respondents, namely, the March 13, 2014 decision of the BCSC relating to liability (the "**Merits Decision**") and the July 3, 2014 decision of the BCSC relating to sanctions (the "**Sanctions Decision**").

[2] In the Merits Decision, the BCSC found that:

(a) IAC, Everett and Duke distributed securities to 126 investors for aggregate proceeds of $5.1 million without having filed a prospectus, in contravention of subsection 61(1) of the British Columbia *Securities Act*, RSCB 1996, c. 418 (the "**BC Act**");

(b) Micron, Everett and Duke contravened a cease-trade order issued by the Executive Director of the BCSC on July 19, 2011; and

(c) The Respondents perpetrated a fraud, contrary to section 57(b) of the BC Act.

II. PRELIMINARY ISSUES

A. Written Hearing

[3] By Order of the Commission dated December 1, 2014 (the "**December Order**"), this matter was converted to a written hearing in accordance with Rule 11.5 of the *OSC Rules of Procedure* and section 5.1 of the *Statutory Powers Procedure Act*, R.S.O, c. S. 22, as amended (the "**SPPA**"). The December Order also established a schedule for the filing of materials by the parties.

B. Failure of the Respondents to Participate

[4] None of the Respondents filed evidence or made submissions.

[5] As Staff of the Commission ("**Staff**") served all of the Respondents with the Notice of Hearing, Statement of Allegations, disclosure and the December Order (Affidavits of Service of Lee Cran, sworn November 25, 2014 and December 16, 2014), I am satisfied that the Respondents had notice of the hearing. The Notice of Hearing, Statement of Allegations and December Order were also posted on the Commission's website. In light of the foregoing, I proceeded in the absence of the Respondents in accordance with subsection 7(2) of the SPPA which authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing.

III. ISSUES AND ANALYSIS

[6] The issues that I must address are as follows:

(a) Does the Sanctions Decision meet the requirements of paragraph 4 of subsection 127(10) of the Act?

(b) Based on the findings of the BCSC, is it in the public interest to make an order under subsection 127(1) of the Act?

(c) If it is in the public interest to make such an order, what are the appropriate sanctions?

A. Requirements of Paragraph 4 of Subsection 127(10)

[7] Staff rely on paragraph 4 of subsection 127(10) of the Act which provides that:

> **(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.

[8] I have reviewed the Merits Decision and the Sanctions Decision and am satisfied that the Respondents are subject to an order of a securities regulatory authority that imposes sanctions, conditions, restrictions and requirements on them as contemplated by paragraph 4 of subsection 127(10) of the Act.

B. Is it in the Public Interest to Make an Order under Subsection 127(1)?

[9] The findings of the BSCS are determinations of fact on which I may rely in determining if it is in the public interest to impose sanctions on the Respondents under subsection 127(1) of the Act (*Re Euston Capital Corp.* (2009), 32 OSCB 6313 at paras. 46, 57; *Re Elliott* (2009), 32 OSCB 6931 at paras. 24, 27). An important factor to consider is whether the Respondents' conduct, if it had taken place in Ontario, 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 (*Re JV Raleigh Superior Holdings Inc.* (2013), 36 OSCB 4639, at para. 16).

[10] In deciding whether it is in the public interest to impose sanctions on the Respondents, I am guided by the purposes of the Act which, as set out in section 1.1 of the Act, 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.

[11] The purpose of an order under subsection 127(1) of the Act is protective and prospective in nature. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. As stated by the Supreme Court of Canada, "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 the 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).

[12] I note the following paragraphs from the Merits Decision:

> ¶ 4 Between August 2002 and July 2011 IAC distributed securities to 126 investors for proceeds of $5.1 million without filing a prospectus and without the availability of any prospectus exemptions. All of the respondents admit that they did so and, in so doing, contravened section 61(1). The evidence corroborates the respondents' admissions.
>
> ¶ 5 On July 19, 2011 the executive director issued an order under section 164(1) that all persons cease trading IAC securities. The executive director issued the order after having determined that IAC had distributed securities in improper reliance on a prospectus exemption.
>
> ¶ 6 After this order was issued, Micron distributed promissory notes to existing IAC investors for proceeds of $195,000, in part to finance IAC expenditures. These promissory notes included a promise by Micron to issue IAC shares to the investors either immediately or in the future.
>
> ¶ 7 Micron, Everett and Duke admit that they contravened the July 2011 cease trade order. The evidence corroborates their admissions.
>
> …

¶ 9 IAC is a subsidiary of Micron. Both were incorporated in British Columbia. Neither has ever been registered or filed a prospectus under the [BC Act].

¶ 10 During the relevant period, Everett and Duke were directors of both IAC and Micron. Both were officers of IAC and Everett was also an officer of Micron.

…

¶ 19 From November 16, 2009 (the date the Sage Hills foreclosure commenced) until July 2011, IAC distributed securities to 55 investors for proceeds of $1.45 million. Micron distributed the promissory notes described above during this period. Neither IAC nor Micron disclosed the foreclosure to these investors.

¶ 41 The development of Sage Hills was IAC's whole business. It was what investors believed they were financing. The Sage Hills development was the entire story told to investors about IAC. All of IAC's promotional materials and all of the communications to investors spoke of nothing else. Clearly, Everett and Duke had to have known that without the Sage Hills property, IAC had no business. They had to have known that without the Sage Hills property, the investors would have no identifiable means of recovering their investment.

¶ 42 In summary, Everett and Duke knew that:

- IAC and Micron did not tell their investors about the Sage Hills foreclosure
- the foreclosure could lead to the sale of the Sage Hills property,
- if the Sage Hills property was sold under the foreclosure, IAC's business would be finished, and
- the Sage Hills foreclosure accordingly put the investors' pecuniary interests at risk.

…

¶ 45 Everett and Duke were the acting and directing minds of IAC and Micron, so their state of mind is attributable to those companies. We find that IAC and Micron had subjective knowledge of the prohibited act and of the consequent risk to the investors' pecuniary interests.

> ¶ 46 We find that Everett, Duke, IAC and Micron perpetrated a fraud, contrary to section 57(b).
>
> …
>
> ¶ 48 Everett and Duke were directors of IAC and Micron, Duke was an officer of IAC, and Everett was an officer of both IAC and Micron. The evidence is clear that they directed the affairs of IAC and Micron. Although we have found that Everett and Duke contravened section 57(b) directly, we also find that Everett and Duke authorized, permitted and acquiesced in IAC's and Micron's contravention of section 57(b) and therefore also contravened section 57(b) under section 168.2(1).

[13] I also note the following from the Sanctions Decision:

> ¶ 2 [In the Merits Decision, we] found that:
>
> - IAC - Independent Academies Canada Inc., Theodore Robert Everett, and Robert H. Duke distributed securities to 126 investors for proceeds of $5.1 million without filing a prospectus, contrary to section 61 (1) of the [BC Act];
>
> - Micron, Everett and Duke contravened a cease-trade order issued by the executive director; and
>
> - all of the respondents perpetrated a fraud, contrary to section 57(b).
>
> …
>
> ¶ 9 Here, the respondents raised $5.1 million from investors without filing a prospectus, $1.645 million of that fraudulently. They knew that the property they told investors would be developed with their money was in foreclosure. Indeed, at the time some of the funds were raised the court had already ordered the sale of the property. Meanwhile, the respondents told investors only positive, but false, news about the development.
>
> ¶ 10 Clearly, there is harm to the investors. None has recovered any part of the investment. There is no evidence that IAC or Micron securities have any present or future value. There is no evidence of any credible hope that investors will recover any part of their investments.

> ¶ 11 The respondents' misconduct damaged the reputation and integrity of our securities market.
>
> …
>
> ¶ 22 … In 2012, Duke offered to sell IAC shares to an existing investor. Duke told him the cease trade order was "just nonsense" and that IAC had "taken care of all that".
>
> ¶ 23 In late June 2013, Everett solicited an existing investor to invest another $5,000. Everett told him that "everything was looking good", that "there is a substantial amount of money in trust and they were winding things up", and that the $5,000 would help pay legal fees to "complete everything."
>
> ¶ 24 This was despite the temporary order and notice of hearing issued by the executive director the previous January, which prohibited Everett from trading or engaging in investor relations activities. Not to mention that the executive director's 2011 cease trade order against IAC was still in force.
>
> ¶ 25 The respondents' blatant disregard of orders made against them under the [BC Act] demonstrates that they are a serious risk to investors and to our markets.

[14] At the conclusion of the Sanctions Hearing, the BCSC ordered:

(a) With respect to IAC and Micron, that:

(i) under section 161(1)(b)(i) of the BC Act, all persons cease trading in, and are prohibited from purchasing, securities of IAC and Micron, permanently;
(ii) under section 161(1)(b)(ii) of the BC Act, IAC and Micron permanently cease trading in, and are permanently prohibited from purchasing, securities and exchange contracts;
(iii) under section 161(1)(d)(v) of the BC Act, IAC and Micron are permanently prohibited from engaging in investor relations activities;
(iv) under section 161(1)(g) of the BC Act, and subject to paragraph [15] below, IAC and Micron pay to the BCSC any amount obtained, or payment or loss avoided, directly or indirectly as a result of the Respondents' contraventions of the BC Act, which the BCSC found to be not less than $5,433,189;

(b) With respect to Everett and Duke that:

(i) under section 161(1)(b)(ii) of the BC Act, Everett and Duke permanently cease trading in, and are permanently prohibited from purchasing, securities and exchange contracts;

(ii) under s. 161(1)(d)(i) and (ii) of the BC Act, Everett and Duke each resign any positions he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

(iii) under section 161(1)(d)(iv) of the BC Act, Everett and Duke are permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

(iv) under section 161(1)(d)(v) of the BC Act, Everett and Duke are permanently prohibited from engaging in investor relations activities;

(v) under section 161(1)(g) of the BC Act, and subject to paragraph [15] below**,** each of Everett and Duke pay to the BCSC any amount obtained, or payment or loss avoided, directly or indirectly as a result of the Respondents' contraventions of the BC Act, which the BCSC found to be not less than $5,433,189; and

(vi) under section 162 of the BC Act, Everett and Duke are jointly and severally liable to pay to the BCSC an administrative penalty of $7 million.

[15] The BCSC also ordered that IAC, Micron, Everett and Duke are jointly and severally liable to pay the amounts described in paragraphs [14](a)(iv) and [14](b)(v) above.

[16] I am satisfied that, if the same events had occurred in Ontario, they would have constituted breaches of the Act and would have been contrary to the public interest. The findings of the BCSC warrant apprehension that the future conduct of the Respondents will be detrimental to the integrity of Ontario's capital markets. Accordingly, I find that it is in the public interest to impose sanctions on the Respondents.

C. **Appropriate Sanctions**

[17] The case law sets out the following non-exhaustive list of factors that should be considered in connection with the imposition of sanctions and which also apply in the context of imposing sanctions as part of an order under subsections 127(1) and 127(10) of the Act:

(a) The seriousness of the Respondents' conduct and their breaches of the BC Act;

(b) The harm to investors;

(c) Whether the Respondents gained from their illegal conduct;

(d) Whether or not the restrictions imposed may serve to deter the Respondents or others from engaging in similar abuses of Ontario investors and Ontario capital markets;

(e) The effect any Ontario restrictions may have on the ability of the Respondents to participate without check in Ontario's capital markets; and

(f) Any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 OSCB 7743 at paras. 25 and 26.)

[18] Both general and specific deterrence are important considerations when imposing sanctions. General deterrence requires the imposition of sanctions that will send a strong message to any other like-minded individuals that the misconduct engaged in is unacceptable and will not be tolerated by the Commission. Specific deterrence requires the imposition of sanctions that will send a strong message to respondents to discourage them from engaging in further misconduct and recidivism in the future. In both cases, general and specific deterrence are important sanctioning factors to consider when determining sanctions to ensure that similar misconduct in the future is discouraged.

[19] The following facts and circumstances of this matter are particularly relevant to my determination of the appropriate sanctions:

(a) The BCSC found that the Respondents engaged in fraud, which the BCSC and the Commission recognize as one of the most egregious securities regulatory violations (Sanctions Order, at para. 7; *Al-Tar Energy Corp.* (2010), 33 OSCB 5535 at para. 214);

(b) The BCSC found that the Respondents distributed securities without a prospectus and raised $5.1 million from investors;

(c) The BCSC found that the investors have not recovered any of their investments;

(d) The BCSC found that Everett and Duke were enriched by their misconduct;

(e) The BCSC found that the Respondents blatantly disregarded orders of the BCSC and are a serious risk to investors and the BC markets; and

(f) The BCSC determined that there were no mitigating factors (Sanctions Order, paras. 16 to 19).

IV. CONCLUSION

[20] For the reasons stated above, I find that it is in the public interest to impose the following sanctions on the Respondents, and will issue an order to that effect:

(a) With respect to IAC that:

  (i) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of IAC cease permanently; and

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

(b) With respect to Micron that:

  (i) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of Micron cease permanently; and

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

(c) With respect to Everett that:

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

(ii) pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by Everett be prohibited permanently;

(iii) pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act, Everett resign any positions that he holds as director or officer of any issuer or registrant; and

(iv) pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act, Everett be prohibited permanently from becoming or acting as an officer or director of any issuer or registrant;

(d) With respect to Duke that:

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

(ii) pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by Duke be prohibited permanently;

(iii) pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act, Duke resign any positions that he holds as director or officer of any issuer or registrant; and

(iv) pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act, Duke be prohibited permanently from becoming or acting as an officer or director of any issuer or registrant.

Dated at Toronto this 26th day of June, 2015.

_____

Christopher Portner