



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
BIGFOOT RECREATION & SKI AREA LTD. And
RONALD STEPHEN MCHAFFIE**

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

Decision: August 20, 2015

Panel: Mary G. Condon - Commissioner

Submissions by: Keir D. Wilmut - For Staff of the Commission
Naila Ruba (Student-at-Law)

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I. OVERVIEW

[1] This was a hearing conducted in writing before the Ontario Securities Commission (the “**Commission** or **OSC**”) 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 Bigfoot Recreation & Ski Area Ltd. (“**Bigfoot**”) and Ronald Stephen McHaffie (“**McHaffie**”) (together, the “**Respondents**”).

[2] A notice of hearing (the “**Notice of Hearing**”) in this matter was issued by the Commission on September 22, 2014 in relation to a statement of allegations (the “**Statement of Allegations**”) filed by Staff of the Commission (“**Staff**”) on the same date.

[3] On October 24, 2014, the Commission heard an application (the “**Application Hearing**”) by Staff to convert this matter to a written hearing in accordance with Rule 11.5 of the Commission’s *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (“**Rules of Procedure**”), and subsection 5.1(2) of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S. 22, as amended (the “**SPPA**”). The Respondents did not appear at the Application Hearing, despite being served with the Notice of Hearing, Statement of Allegations and disclosure. On October 24, 2014, the Commission issued an order (the “**October 24 Order**”), stating that it would grant Staff’s request subject to the Respondents’ right to object under the *Rules of Procedure*.

[4] Staff filed an Affidavit of Lee Crann, sworn November 17, 2014, confirming service of the October 24 Order on the Respondents as of November 4, 2014. On November 19, 2014, the Commission made an order granting Staff’s application to proceed by written hearing (the “**November 19 Order**”).

[5] Staff filed written submissions, a hearing brief and a brief of authorities, as well as an Affidavit of Lee Crann, sworn December 3, 2014, confirming service of the November 19 Order on the Respondents. The Respondent did not file any responding materials. I am satisfied that the Respondents were provided with notice of the November 19 Order. Pursuant to Rule 7.1 of the Commission’s *Rules of Procedure* and subsection 7(2) of the *SPPA*, I may proceed in the absence of the Respondent.

[6] These are my reasons and decision with respect to the sanctions sought by Staff in this matter.

[7] On June 3, 2014, a panel of the British Columbia Securities Commission (the “**BCSC Panel**”) made an order that the Respondents engaged in an illegal distribution of securities contrary to 61(1) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 (the “**BC Act**”) ((*Bigfoot Recreation & Ski Area Ltd (Re)* 2014 B.C.S.E.C.C.O.M. 213) (the “**BCSC Order**”).

[8] Specifically, the BCSC Panel found the following:

- a. The Respondents distributed securities to 27 investors, who invested a total of \$621,960, without filing a prospectus and without the availability of any exemptions, contrary to section 61(1) of the BC Act;
- b. As a director of Bigfoot, McHaffie authorized, permitted and acquiesced in Bigfoot's contravention of section 61, and therefore also contravened that section under section 168.2 of the BC Act; and
- c. McHaffie perpetrated a fraud on 30 investors (including 3 who purchased by way of an exemption) for proceeds of \$642,960, contrary to section 57(b) of the BC Act.

[9] The BCSC Order imposes sanctions, condition, restriction or requirements on the Respondents within the meaning of paragraph 4 of subsection 127(10) of the *Act*.

II. SANCTIONS OF THE BRITISH COLUMBIA SECURITIES COMMISSION

The BCSC Order

[10] The BCSC Order imposes the following sanctions, conditions, restrictions or requirements upon the Respondents:

- a. Upon McHaffie
 - i. Pursuant to section 162(1)(b) of the BC Act, that McHaffie cease trading permanently, and is permanently prohibited from purchasing, securities or exchange contracts;
 - ii. Pursuant to section 161(1)(d)(i) and (ii) of the BC Act, that McHaffie resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;
 - iii. Pursuant to section 161(1)(d)(iii) of the BC Act, that McHaffie is permanently prohibited from becoming or acting as a registrant or promoter;
 - iv. Pursuant to section 161(1)(d)(iv) of the BC Act, that McHaffie is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
 - v. Pursuant to section 161(1)(d)(v) of the BC Act, that McHaffie is permanently prohibited from engaging in investor relations activities;

- vi. Pursuant to section 161(1)(g) of the BC Act, that McHaffie pay to the BCSC the funds he obtained as a result of his contraventions of the BC Act, which the BCSC Panel found to be not less than \$642,960;
- vii. Pursuant to section 162 of the BC Act, that McHaffie pay to the BCSC an administrative penalty of \$2 million.

b. upon Bigfoot:

- i. pursuant to section 161(1)(b) of BC Act, that all persons cease trading permanently, and are prohibited permanently from purchasing, any securities of Bigfoot;
- ii. pursuant to section 161(1)(b) of BC Act, that Bigfoot permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts;
- iii. pursuant to section 161(1)(d)(iii) of the BC Act, that Bigfoot is prohibited permanently from becoming or acting as a registrant, or promoter;
- iv. pursuant to section 161(1)(d)(iv) of the BC Act, that Bigfoot is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
- v. pursuant to section 161(1)(d)(v) of the BC Act, that Bigfoot is prohibited permanently from engaging in investor relations activities;
- vi. pursuant to section 161(1)(g) of the BC Act, that Bigfoot pay to the BCSC the funds it obtained as result of its contraventions of the BC Act, which the BCSC Panel found to be not less than \$621,960; and
- vii. that the amount paid under paragraphs 12(a)(vi) and 12(b)(vi) [of the BCSC Order] shall not exceed, in the aggregate, the amount obtained by the Respondents' respective contraventions of the BC Act.

III. SUBMISSIONS OF THE PARTIES

Staff's Submissions

[11] Staff submits that it is in the public interest for the Commission to exercise its inter-jurisdictional enforcement authority under paragraph 4 of subsection 127(10) of the *Act* to protect investors in Ontario and Ontario's capital markets from potential misconduct by the Respondents and that sanctions substantially similar to those imposed by the BCSC Order be imposed on the Respondents.

[12] Staff submits that the sanctions imposed in the BCSC Order are proportionately appropriate to the misconduct of the Respondents, and serve as both specific and general deterrence. Staff further submits that a protective order imposing conditions on the Respondents substantially similar to those imposed by the BCSC Order is required to protect investors in Ontario and Ontario's capital markets from similar misconduct by the Respondents.

[13] Staff submits that it does not have any evidence to suggest that Ontario investors were harmed by the Respondents' conduct. However, Staff argues that the Commission needs to be aware of and responsive to an increasingly complex and interconnected inter-provincial securities industry. Accordingly, Staff respectfully 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.

[14] Staff submits that the following sanctions be imposed on the Respondents:

- a. Against McHaffie that:
 - i. pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities by McHaffie cease permanently;
 - ii. pursuant to paragraph 2.1 of subsection 127(1) of the *Act*, acquisition of any securities by McHaffie be prohibited permanently;
 - iii. pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the *Act*, McHaffie resign any position that he holds as a director or officer of any issuer or registrant;
 - iv. pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the *Act*, McHaffie be prohibited permanently from becoming or acting as an officer or director of any issuer or registrant; and

- v. pursuant to paragraph 8.5 of subsection 127(1) of the *Act*, McHaffie be prohibited permanently from becoming or acting as a registrant or as a promotor;
- b. against Bigfoot that:
- i. pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities of Bigfoot cease permanently;
 - ii. pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities by Bigfoot cease permanently;
 - iii. pursuant to paragraph 2.1 of subsection 127(1) of the *Act*, acquisition of any securities by Bigfoot be prohibited permanently; and
 - iv. pursuant to paragraph 8.5 of subsection 127(1) of the *Act*, Bigfoot be prohibited permanently from becoming or acting as a registrant or as a promoter.

Respondents' Submissions

[15] The Respondents did not appear and did not make any submissions in this proceeding.

IV. ANALYSIS

A. Inter-jurisdictional Enforcement

[16] The relevant pre-conditions to be met for an inter-jurisdictional order are articulated in paragraph 4 of subsection 127(10) of the *Act*. An order may be made if:

- 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.

[17] The Commission held in *Elliott (Re)* (2009), 23 OSCB 6931 (“*Elliott*”) that subsection 127(10) “allows the Commission to consider any convictions or orders made against an individual in other jurisdictions, when deciding whether or not to make an order under subsection 127(1) or (5) in the public interest” (*Elliott* at para. 24).

[18] Pursuant to the BCSC Order, the Respondents are subject to sanctions, conditions, restrictions or requirements within the meaning of paragraph 4 of subsection 127(10) of the *Act*.

Accordingly, based on the BCSC Order, the Commission may make one or more orders under subsection 127(1) of the *Act*, if it is in the public interest to do so.

[19] In *Euston Capital Corp. (Re)* (2009), 32 O.S.C.B. 6313 (“*Euston Capital*”), the Commission concluded that subsection 127(10) of the *Act* can be the grounds for an order in the public interest under subsection 127(1) of the *Act*:

... we conclude that we can make an order against the Respondents pursuant to our public interest jurisdiction under section 127 of the *Act* on the basis of decisions and orders made in other jurisdictions, if we find it necessary in order to protect investors in Ontario and the integrity of Ontario’s capital markets.

(*Euston Capital, supra*, at para. 46.)

[20] While a panel may rely on the findings of the other jurisdiction, it must then satisfy itself that an order for sanctions is necessary to protect the public interest in Ontario:

The applicability of subsection 127(10) to the BCSC Order and the Settlement Agreement does not automatically lead to the conclusion that this Panel must make an order similar to that made by the BCSC against Elliott. Rather, we must first consider whether or not sanctions are necessary to protect the public interest, before exercising any powers granted to us under subsections 127(1) and (5), and second, if necessary, consider what the appropriate sanctions should be.

(*Elliott, supra* at para. 27.)

[21] The Commission has relied on the findings made in other jurisdictions, and has not required a nexus to Ontario, when considering imposing a reciprocal order. However, while a nexus to Ontario is not a necessary pre-condition to the Commission’s jurisdiction to make an order in the public interest, it is a factor that may be considered by the Commission in determining whether to make such an order (*Euston, supra* at para. 42 citing *Biller (Re)* (2005), 28 O.S.C.B. 10131 at para. 32; *Reeves (Re)* (2012), 35 O.S.C.B. 5140 at para. 8).

B. The Commission’s Discretion to Determine Sanctions

[22] I may make an order against the Respondents under section 127 of the *Act* based on the BCSC Order if I find it necessary in order to protect investors in Ontario and the integrity of Ontario's capital markets.

[23] The BCSC Order imposed significant sanctions on the Respondents. As previously indicated, Staff submit that the Commission should exercise its discretion to impose sanctions substantially similar to those imposed in the BCSC Order to the extent possible under the *Act*.

[24] The Commission must also ensure that the sanctions imposed in a case are proportionate to the circumstances and the conduct of each of respondents (*Coventree Inc., Geoffrey Cornish and Dean Tai (Re)* (2012), 35 O.S.C.B. 119 at para. 46).

Mitigating Factors

[25] The BCSC Order discerned no mitigating factors.

C. Should an Order for Sanctions be Imposed in Ontario?

[26] When exercising the public interest jurisdiction under section 127 of the *Act*, I must consider the purposes of the *Act*. Those purposes, set out in section 1.1 of the *Act*, are:

- (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.

[27] In pursuing these purposes, I must have regard for the fundamental principles described in section 2.1 of the *Act*. That section provides that one of the primary means for achieving the purposes of the *Act* is to restrict fraudulent and unfair market practices and procedures. Another fundamental principle is that:

[t]he integration of capital markets [be] supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.

(*Act, supra* at subsection 2.1(5).)

[28] The principles that guide the Commission in exercising its public interest jurisdiction are reflected in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 S.C.C. 37 ("*Asbestos*") where the Supreme Court of Canada considered the nature of section 127:

[I]t is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive...."

...[t]he 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 OSC 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."

(*Asbestos*, at paras. 42-43, citing *Mithras Management Ltd. (Re)* (1990), 13 O.S.C.B. 1600.)

[29] In light of the principles of the Act and the findings of the BCSC of serious securities regulatory infractions, I find that it is necessary to order sanctions against the Respondents in the public interest. This will serve to protect investors in Ontario and the integrity of Ontario's capital markets. I consider specific aspects of the BCSC findings below. Moreover, I have the authority to make a public interest order under subsections 127(1) and 127(10) of the *Act*, based on the BCSC Order.

D. The Appropriate Sanctions

[30] In determining the nature and duration of the appropriate sanctions in this case, I must consider all of the relevant facts and circumstances before me. Previous decisions of the Commission have considered a list of factors. The factors I consider most relevant in this case are:

- (a) the seriousness of the conduct and the breaches of the BC Act.;
- (b) the level of a respondents' activity in the marketplace;
- (c) whether the violations are isolated or recurrent;
- (d) any size of the profit gained or loss avoided from the illegal conduct; and
- (e) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746; *M.C.J.C. Holdings (Re)* (2002), 25 O.S.C.B. 1133 at p. 1134.)

Seriousness of the Conduct

[31] The Respondents were found by the BCSC Panel to have breached British Columbia securities law, and in particular, McHaffie was found to have breached the provision prohibiting fraudulent conduct. This Commission has previously recognized fraud to be a particularly egregious violation of securities law (*Al-Tar Energy Corp. (Re)* (2011), 34 O.S.C.B. 447). As

noted above, the BCSC Panel found there were no mitigating factors present in this matter and as such this conduct remains at the high end of egregiousness.

Level of Respondents' Activity in the Marketplace

[32] The Respondents engaged in a course of conduct whereby they raised approximately \$642,960 from 30 investors. In order to solicit investor involvement, McHaffie provided investors with promotional materials and made false representations to investors.

Whether the Violations are Isolated or Recurrent

[33] The Respondents engaged in the illegal conduct between August 2007 and January 2012. This is a substantial amount of time during which the Respondents persisted in engaging in conduct that breached British Columbia securities laws.

Size of the Profit Gained or Loss Avoided from the Illegal Conduct

[34] McHaffie had promised investors that their investments would be used to pursue the development of a ski and recreation area. However McHaffie misappropriated the \$642,960 raised and instead used investor funds for personal expenses.

[35] Based on the foregoing, I have concluded that it is in the public interest to make an order under subsection 127(1) of the *Act*. In imposing sanctions, I rely on the BCSC Order.

V. CONCLUSION

[36] Accordingly, I find it is in the public interest to issue the following orders upon the Respondents:

- a. against McHaffie that:
 - i. pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities by McHaffie cease permanently;
 - ii. pursuant to paragraph 2.1 of subsection 127(1) of the *Act*, acquisition of any securities by McHaffie be prohibited permanently;
 - iii. pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the *Act*, McHaffie resign any position that he holds as a director or officer of any issuer or registrant;
 - iv. pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the *Act*, McHaffie be prohibited permanently from becoming or acting as an officer or director of any issuer or registrant; and

- v. pursuant to paragraph 8.5 of subsection 127(1) of the *Act*, McHaffie be prohibited permanently from becoming or acting as a registrant or as a promoter;
- b. against Bigfoot that:
- i. pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities of Bigfoot cease permanently;
 - ii. pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities by Bigfoot cease permanently;
 - iii. pursuant to paragraph 2.1 of subsection 127(1) of the *Act*, acquisition of any securities by Bigfoot be prohibited permanently; and
 - iv. pursuant to paragraph 8.5 of subsection 127(1) of the *Act*, Bigfoot be prohibited permanently from becoming or acting as a registrant or as a promoter.

Dated at Toronto this 20th day of August, 2015.

“Mary G. Condon”

Mary G. Condon