



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF
THE *SECURITIES ACT*, RSO 1990, c S.5**

- AND -

**IN THE MATTER OF
THE FALLS CAPITAL CORP.,
DEERCREST CONSTRUCTION FUND INC.,
WEST KARMA LTD. and RODNEY JACK WHARRAM**

**REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*)**

Hearing: In writing

Decision: October 17, 2016

Panel: Timothy Moseley Commissioner

Submissions by: Keir D. Wilmut For Staff of the Commission

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REASONS AND DECISION

I. OVERVIEW

- [1] In a decision issued by the British Columbia Securities Commission (the “**BCSC**”) on February 11, 2015 (the “**BCSC Merits Decision**”),¹ the BCSC found that The Falls Capital Corp., Deercrest Construction Fund Inc., West Karma Ltd. and Rodney Jack Wharram perpetrated a fraud in contravention of section 57(b) of British Columbia’s *Securities Act* (the “**BC Act**”).² The BCSC further found that Wharram had made false statements to BCSC investigators in contravention of section 168.1(1)(a) of the BC Act.
- [2] On November 25, 2015, the BCSC issued a decision (the “**BCSC Sanctions Decision**”)³ in which it imposed various sanctions against the respondents. The sanctions, more particularly described below, essentially removed the respondents from British Columbia’s capital markets permanently. The BCSC also ordered that Wharram pay an administrative penalty and that all respondents disgorge funds that had been illegally obtained.
- [3] In this proceeding, Enforcement staff (“**Staff**”) of the Ontario Securities Commission (the “**Commission**”) seeks an order pursuant to subsection 127(1) of the Ontario *Securities Act* (the “**Act**”)⁴ that mirrors most of the terms of the BCSC Sanctions Decision. Staff relies upon paragraph 4 of subsection 127(10) of the Act, which provides that this Commission may make an order against a person under subsection 127(1) if that person is subject to an order, made by a securities regulatory authority in another jurisdiction, that imposes sanctions on the person.
- [4] For the reasons that follow, I find that it is in the public interest to issue the order requested by Staff.

II. THE BCSC PROCEEDING

- [5] In the BCSC Merits Decision, the BCSC found, among other things, that:
- a. Wharram was the President, a director, and the directing mind of each of the three corporate respondents (*i.e.*, The Falls Capital Corp., Deercrest Construction Fund Inc., and West Karma Ltd.);⁵
 - b. the respondents, none of whom had ever been registered in any capacity under the BC Act,⁶ raised funds from investors, primarily for the purpose of the development of recreational property in British Columbia;⁷
 - c. Wharram fraudulently used more than \$500,000 of the raised funds for personal purposes, including a ring for his wife, the purchase of a home, and investment by his wife in a grocery store;⁸

¹ *Re The Falls Capital Corp.*, 2015 BCSECCOM 59. The BCSC issued a second decision shortly afterwards (*Re The Falls Capital Corp.*, 2015 BCSECCOM 74), in which it restated some findings made in the BCSC Merits Decision. The restatement is inconsequential for the purposes of this proceeding.

² RSBC 1996, c 418.

³ *Re The Falls Capital Corp.*, 2015 BCSECCOM 422.

⁴ RSO 1990, c S.5.

⁵ BCSC Merits Decision at para 7.

⁶ BCSC Merits Decision at paras 5, 6.

⁷ BCSC Merits Decision at paras 9, 10, 26, 32.

⁸ BCSC Merits Decision at paras 22, 39, 42, 115, 121, 122, 124, 128, 132, 142.

- d. the investors lost all the money Wharram used for personal purposes;⁹ and
- e. Wharram lied under oath to BCSC investigators.¹⁰

[6] In considering sanctions, the BCSC concluded that:

- a. the respondents' conduct was "an egregious form of fraud";¹¹
- b. investors suffered significant losses, losing all or substantially all of their investments;¹²
- c. evidence from a number of investors suggested that the financial impact of their losses was "catastrophic";¹³
- d. there were no mitigating factors;¹⁴ and
- e. Wharram "represents a significant future risk to our capital markets".¹⁵

[7] As a result, the BCSC ordered that:

- a. Wharram pay an administrative penalty of \$500,000;
- b. Wharram resign any position he held as a director or officer of any issuer, registrant or investment fund manager, and be prohibited permanently from becoming or acting as any of those;
- c. the respondents be prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;
- d. Wharram be prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;
- e. the respondents be prohibited permanently from engaging in investor relations activities;
- f. the respondents be prohibited permanently from trading in or purchasing any securities or exchange contracts;
- g. trading in, or the purchase of, securities of the corporate respondents be prohibited permanently; and
- h. the respondents disgorge to the BCSC the \$517,500 obtained as a result of their misconduct.¹⁶

III. PRELIMINARY MATTERS

A. Notice to the respondents

[8] The Notice of Hearing issued to commence this proceeding specified that the hearing would take place on August 29, 2016.

⁹ BCSC Merits Decision at para 134.

¹⁰ BCSC Merits Decision at para 150; BCSC Sanctions Decision at para 28.

¹¹ BCSC Sanctions Decision at para 27.

¹² BCSC Sanctions Decision at paras 31, 35.

¹³ BCSC Sanctions Decision at para 32.

¹⁴ BCSC Sanctions Decision at para 44.

¹⁵ BCSC Sanctions Decision at para 57.

¹⁶ BCSC Sanctions Decision at para 74.

- [9] At the hearing before me on that date, the respondents did not appear. Staff tendered an affidavit of Lee Crann, sworn August 22, 2016,¹⁷ which described steps taken to serve the respondents with the Notice of Hearing, the Statement of Allegations, and disclosure.
- [10] Subsection 7(1) of the *Statutory Powers Procedure Act* (the “SPPA”)¹⁸ provides that where notice of a hearing has been given to a party, but the party fails to attend, the tribunal may proceed in the absence of the party and the party is not entitled to further notice in the proceeding.
- [11] I find that the respondents were given notice of this proceeding and that I may proceed in their absence.

B. Written Hearing

- [12] The Notice of Hearing indicated that Staff would apply to continue this proceeding by way of written hearing, as provided for in section 5.1 of the SPPA and Rule 11.5 of the *Ontario Securities Commission Rules of Procedure*.¹⁹
- [13] At the August 29 hearing, I granted Staff’s application to proceed in writing. I ordered that Staff serve and file its materials by September 8, 2016, and that the respondents serve and file any responding materials by October 6, 2016.
- [14] Staff served and filed a hearing brief containing the BCSC decisions along with written submissions and a brief of authorities. No materials were filed by the respondents.

IV. ISSUES

- [15] As noted above, subsection 127(10) of the Act provides that the Commission may make an order against a person or company under subsection 127(1) if that person or company is subject to an order, made by a securities regulatory authority in another jurisdiction, that imposes sanctions.
- [16] Staff’s application for an order pursuant to subsection 127(1), made in reliance upon subsection 127(10), therefore presents two principal issues:
- a. Were the respondents subject to an order made by a securities regulatory authority in another jurisdiction?
 - b. If so, what sanctions, if any, should the Commission order against them?

V. ANALYSIS

A. Were the respondents subject to an order made by a securities regulatory authority in another jurisdiction?

- [17] The BCSC Sanctions Decision is an order of a securities regulatory authority in another jurisdiction. It imposes sanctions on the respondents.
- [18] The BCSC Sanctions Decision therefore meets the test prescribed by subsection 127(10) of the Act, and the Commission may make an order under subsection 127(1) if it is in the public interest to do so.²⁰

¹⁷ Exhibit 1 in this proceeding.

¹⁸ RSO 1990, c S.22.

¹⁹ (2014), 37 OSCB 4168.

²⁰ *Re Euston Capital Corp* (2009), 32 OSCB 6313 at para 46.

B. If so, what sanctions, if any, should the Commission order against the respondents?

1. Introduction

[19] Subsection 127(10) of the Act does not itself empower the Commission to make an order; rather, it provides a basis for an order under subsection 127(1). The Commission must still consider whether it is in the public interest, in the context of the Ontario capital markets, to make an order under subsection 127(1), and if so, what the order ought to be.²¹

2. Inter-jurisdictional co-operation

[20] In determining whether it would be in the public interest to make an order pursuant to section 127 of the Act, I am guided by section 2.1 of the Act, which provides:

In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:

[...]

3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of [the] Act by the Commission.

[...]

5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.

[21] By explicitly referring to orders made by securities regulatory authorities in other jurisdictions, subsection 127(10) of the Act clearly promotes these legislative objectives. This is also well recognized in decisions of the Supreme Court of Canada²² and of the Commission.²³

[22] As the Commission has previously held, “[t]he 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.”²⁴

[23] In this case, the findings of the BCSC with respect to the respondents’ conduct are compelling reasons to conclude that it is in the public interest to restrict the respondents’ participation in Ontario’s capital markets. The misconduct for which the respondents were sanctioned would likely have constituted similar contraventions of Ontario securities law.

²¹ *Re Elliott* (2009), 32 OSCB 6931 at para 27.

²² See, e.g., *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 51.

²³ *Re JV Raleigh Superior Holdings Inc.* (2013), 36 OSCB 4639 (“**JV Raleigh**”) at paras 21-26; *New Futures Trading International Corp. (Re)* (2013), 36 OSCB 5713 at paras 22-27.

²⁴ *JV Raleigh* at para 16.

- [24] There is no evidence to suggest that any of the affected investors reside in Ontario. However, as this Commission has previously found, a nexus to Ontario is not required when considering the imposition of an inter-jurisdictional order.²⁵ Staff 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. I accept that submission.
- [25] In addition, as the Supreme Court of Canada has held, it is appropriate to consider general deterrence in making an order under subsection 127(1).²⁶ An order in this proceeding would have a deterrent effect upon those who might engage in similar conduct in Ontario.
- [26] For all of these reasons, I find that it is in the public interest to make an order against the respondents pursuant to section 127(1) of the Act.

3. Appropriate sanctions

- [27] The purpose of section 127 of the Act, and the principles that "animate" its application, were reviewed by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*.²⁷ The Court held that in considering an order in the public interest, it is important to keep in mind both of the two purposes of the Act, as set out in section 1.1 of the Act:²⁸
- 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.
- [28] The Court then described the purpose of the section 127 public interest jurisdiction as being "neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets".²⁹ Further, the Court held that the purpose of section 127 orders 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.³⁰
- [29] In this case, Staff asks the Commission to order sanctions substantially similar to those imposed by the BCSC. Specifically, Staff requests that the Commission order that:
- a. trading in any securities of the corporate respondents cease permanently;
 - b. the respondents be prohibited permanently from trading in any securities or derivatives and from acquiring any securities;

²⁵ *Re Zeiben* (2016), 39 OSCB 1299 at para 24; *Re Sebastian* (2016), 39 OSCB 1305 at para 19; *Re Dowlati* (2016), 39 OSCB 5081 at para 25.

²⁶ *Re Cartaway Resources Corp.*, 2004 SCC 26 at para 60.

²⁷ 2001 SCC 37 ("**Asbestos**").

²⁸ *Asbestos* at para 41.

²⁹ *Asbestos* at para 42, adopting the words of Laskin J.A. from the court below.

³⁰ *Asbestos* at para 43, citing with approval *Re Mithras Management Ltd.* (1990), 13 OSCB 1600.

- c. Wharram resign any positions he holds as director or officer of any issuer, registrant or investment fund manager;
 - d. Wharram be prohibited permanently from becoming or acting as a director or officer of an issuer, registrant or investment fund manager; and
 - e. the respondents be prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter.
- [30] The respondents' misconduct was serious. As the BCSC found, the respondents defrauded investors by diverting significant funds to Wharram's personal use. Investors suffered significant and sometimes catastrophic losses. Further, Wharram lied under oath to BCSC investigators.
- [31] Had the respondents' misconduct occurred in Ontario, it would likely have attracted consequences similar to those ordered by the BCSC.
- [32] Appropriately, Staff does not seek an order in Ontario that would require the payment of an additional administrative penalty or the further disgorgement of funds. The order sought would restrict the respondents' access to and participation in Ontario's capital markets.
- [33] In my view, the order requested by Staff is proportionate to the misconduct as found by the BCSC, would serve to protect Ontario's investors and capital markets, would further the objective of inter-jurisdictional co-operation, and would have an appropriate general deterrence effect in Ontario.

VI. CONCLUSION

- [34] For the reasons set out above, I find that it is in the public interest to impose the sanctions requested by Staff. I will therefore order that:
- a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of the corporate respondents cease permanently;
 - b. pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, trading in any securities or derivatives, or acquisition of any securities by the respondents be prohibited permanently;
 - c. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Wharram resign any positions that he holds as director or officer of any issuer, registrant or investment fund manager;
 - d. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Wharram be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager; and
 - e. pursuant to paragraph 8.5 of subsection 127(1) of the Act, the respondents be prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter.

Dated at Toronto this 17th day of October, 2016.

"Timothy Moseley"

TIMOTHY MOSELEY