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 oust, Toronto ON M5H 3S8

Citation: *McClure (Re)*, 2017 ONSEC 34
Date: 2017-10-02

**IN THE MATTER OF**
**DAVID GREGOR McCLURE**

**REASONS FOR DECISION**
**(Subsections 127(1) and (10) of the *Securities Act*, RSO 1990, c S.5)**

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| **Hearing:** | September 26, 2017 | |
| **Reasons:** | October 2, 2017 | |
| **Panel:** | Philip Anisman | Commissioner |
| **Appearances by:** | Malinda N. Alvaro | For Staff of the Commission |
| | | David Gregor McClure not appearing |

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## REASONS FOR DECISION

## I. INTRODUCTION

[1] Reciprocal orders represent a legislative recognition of the fact that Canada's securities markets are not constrained by provincial borders. The *Securities Act* of Ontario (the Act), for example, authorizes the Ontario Securities Commission (the Commission) to make an order under subsection 127(1) imposing sanctions on a person who has been convicted of an offence in or found to have contravened the laws of any jurisdiction for conduct relating to securities or derivatives or who has been sanctioned by another securities, derivatives or financial regulatory authority under an order made by or under an agreement with that authority.[1]

[2] Although a conviction, finding, order or agreement may provide a sufficient basis for the Commission to make an order under subsection 127(1), the Commission must determine the sanctions that are appropriate in the public interest. In a proceeding based on an order or agreement (s. 127(10)4 or 5), the sanctions will generally mirror the sanctions imposed by another provincial securities regulatory authority, but they may not result in "twin orders"[2], as the sanctions authorized by subsection 127(1) are not always identical to the sanctions available under the securities acts in other provinces.[3] As a result, it is frequently necessary to modify the terms of an order that is being reciprocated so that the Commission's reciprocating order both accomplishes the purpose of the original order to the extent necessary to protect investors and the securities market in Ontario and is within its jurisdiction under subsection 127(1).[4]

[3] This proceeding illustrates this process. On August 16, 2017, the respondent, David Gregor McClure (McClure), entered a settlement agreement and undertaking (Settlement Agreement) with the Alberta Securities Commission (ASC), in which he admitted that he traded in securities without being registered, distributed securities of four corporations that as a director, he managed and/or controlled, without filing a prospectus, and made misrepresentations to investors in connection with the sale of shares, contrary to the Alberta *Securities Act* (ASA) and the public interest.[5]

[4] In addition to his agreeing to pay $50,000 to the ASC as a settlement and $30,000 for ASC Staff's investigation and legal costs, McClure agreed to resign all positions he held as a director or officer of an issuer "that relies on any exemptions contained in Alberta securities laws or that distributes securities to the public" and to refrain for three years from becoming or acting as a director or officer of any such issuer, from trading or purchasing securities or derivatives other than in a tax-saving plan under Canadian tax law, and from relying on an

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[1] RSO 1990, c S.5, s. 127(10) (**OSA** or **Act**).
[2] *McLean v. British Columbia (Securities Commission)*, [2013] 3 SCR 895 at para 15.
[3] See e.g. *Re Dhanani* (2017), 40 OSCB 4457 at paras 8-9 and 13.
[4] An order based on judicial proceedings, whether criminal or civil, is not reciprocal in the sense of mirroring an order of another regulator, but is based on the conviction or finding and the conduct underlying it; see e.g. *Re Banks* (2003), 26 OSCB 3377 at paras. 10-13, 92-93 and 126-128; *Re Drabinsky* (2017), 40 OSCB 5305.
[5] *Re McClure*, 2017 ABASC 144; McClure's conduct contravened subsections 75(1), 92(4.1) and 110(1) of the *Securities Act*, RSA 2000, c S-4, as amended (**ASA**).

exemption in Alberta securities law. He also agreed to refrain for three years from engaging in "investor relations activities", advising in securities or derivatives and "acting in a management or consultative capacity in connection with activities in the securities market." The former four non-monetary sanctions parallel express provisions in subsection 127(1); the latter three do not.[6]

## II. THE ORDER

[5] The order made on September 26, 2017 (the Order), to which McClure consented, reciprocates the non-monetary sanctions in the Settlement Agreement with modifications reflecting the differences between subsection 127(1) and the ASA.

[6] Paragraphs 1 and 2 of the Order reflect the three-year prohibition in the Settlement Agreement against trading or purchasing securities or derivatives. The authority under the Act, however, is more limited than under the ASA.[7] While the Commission may prohibit trading in securities and derivatives, it can only prohibit the acquisition of securities.[8] Accordingly paragraph 2 of the Order prohibits the acquisition of securities, but makes clear that the prohibition applies to derivatives that are securities. It thus replicates the Settlement Agreement to the extent possible under the Act.

[7] The Settlement Agreement prohibits McClure from acting as a director or officer of an issuer that relies on an exemption in Alberta securities law or distributes securities to the public. As an issuer that distributes securities in Ontario must rely on an exemption or file a prospectus, the parallel prohibition in paragraphs 4 and 5 of the Order prohibits McClure from acting as a director or officer of any issuer.

[8] Subsection 127(1) of the Act does not refer to investor relations activities or acting in a management or consultative capacity and it does not authorize the Commission to prohibit advising.[9] The ASA defines "investor relations activities" as "any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer".[10] Investor relations activities may thus constitute "trading"[11] and may include activities by a registrant, a promoter, an officer of an issuer, a consultant or another third party.

[9] The ASA does not define "acting in a management or consultative capacity". Although it defines "management contract" and "management company" in terms of providing investment advice,[12] the prohibition in the Settlement Agreement extends further. Managerial and consultative activities relating to the

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[6] OSA, ss. 127(1)2, 2.1, 3, 7 and 8.
[7] ASA, s. 198(1)(b) authorizes an order that a person "cease trading in or purchasing" securities or derivatives.
[8] OSA, ss. 127(1)2 and 2.1.
[9] Compare ASA, ss. 198(1)(c.1), (e.1) and (e.3). ASA, s. 1(a.1) defines "advising in securities or derivatives" as including "giving, offering or agreeing to give advice to another person or company about investing or buying or selling securities or derivatives".
[10] ASA, s. 1(bb.3). The definition excludes specified activities that are not relevant here.
[11] See OSA, s. 1(1) "trade" or "trading" (e) (conduct in furtherance of a sale of a security or of a derivatives transaction).
[12] ASA, ss. 1(dd) and (ee); see also OSA, s. 1(1).

securities market may be performed by a director or officer of an issuer, a registrant, including an adviser, an investment fund manager, a promoter or a third party consultant.

[10] The Order addresses these sanctions in paragraphs 4 to 7.[13] It prohibits McClure from acting as a director or officer of an issuer or registrant (including an investment fund manager)[14] and from acting as a registrant[15] or promoter. Although the sanctions in the Settlement Agreement may be somewhat broader, the Order thus parallels them to the extent of the Commission's authority under the Act and effectively prohibits McClure from engaging in activities relating to the securities market in Ontario like those identified in the Settlement Agreement.

## III. A NOTE ON PROCESS

[11] It should be noted that the process followed in this proceeding has been exemplary. The Statement of Allegations and the Notice of Hearing were issued on August 31, 2017, approximately two weeks after the Settlement Agreement was signed. Staff served the Notice of Hearing and the Statement of Allegations on McClure the following day, September 1, 2017, by email and courier, and on September 6, 2017 emailed the lawyer who had represented McClure before the ASC.[16]

[12] McClure's lawyer responded that he had instructions to accept service and advised that McClure would neither oppose nor appear. Staff served their materials on September 7[17] and their hearing brief on September 19, 2017.[18] The hearing brief contained a copy of a consent to a draft order signed by McClure's lawyer earlier that day.[19]

[13] These materials were filed and provided to me prior to the hearing. On September 25, 2017, at my request, the Registrar sent a revised draft order to Staff, asked them to send a copy of it to McClure's lawyer, and stated that any issues could be addressed at the hearing.[20] McClure's lawyer confirmed his consent to the revised draft order prior to the hearing.[21]

[14] The revised order was addressed at the hearing on September 26, 2017 and signed that day, approximately six weeks after the Settlement Agreement.

[15] As stated in *Dhanani*, in an ideal world, the sanctions in the Settlement Agreement would have become effective throughout Canada on August 16,

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[13] As well as in paragraph 1, which prohibits trading in securities and derivatives.
[14] As an investment fund manager is also a registrant, the express inclusion results from repetition in subsection 127(1); see *Re Dhanani*, note 3, above, para 14.
[15] A person may not engage in the business of advising without registration; OSA, s. 25(3). As the Order also provides that no exemption applies to McClure, it prohibits all such activity by him.
[16] Exhibit 1, Affidavit of Lee Crann, sworn September 20, 2017. Rule 1.5.1(2)(c) of the *OSC Rules of Procedure* provides that electronic service is effective on the day it is sent. Service by courier is effective on the earlier of the date of delivery and the second day after it is sent (Rule 1.5.1(2)(d)); Staff's materials were delivered on September 5, 2017 (Exhibit 1, Tab 2).
[17] *Ibid*.
[18] Exhibit 2, Affidavit of Lee Crann, sworn September 20, 2017.
[19] Exhibit 3, Hearing Brief of Staff, Tab 1 (Consent) and Tab 4 (Draft Order).
[20] Exhibit 4, Email from Lee Crann, September 25, 2017.
[21] Exhibit 5, Email from Phil Lalonde, September 25, 2017.

2017.[22] In this case, Staff followed its usual practice of requesting in the Notice of Hearing and Statement of Allegations that the proceeding be conducted in writing. McClure's consent permitted the Order to be made on the initial return date. A process like the one suggested in *Dhanani*,[23] in which Staff serves its materials and brief with the Notice of Hearing, would facilitate making reciprocal orders more expeditiously following a timeline like the one that occurred in this case.

Dated at Toronto this 2nd day of October, 2017.

*"Philip Anisman"*

Philip Anisman

[22] *Re Dhanani*, note 3, above, para 11. *Dhanani* refers to four provinces in which protective orders by securities regulatory authorities in Canada automatically apply as of the date they are made. There are now five such provinces; see *Securities Act*, RSM 1988, c S50, ss 148.4(3)-(4), added by SM 2017, c 2, s 2 (effective June 2, 2017).

[23] *Re Dhanani*, note 3, above, para 12.