



Ontario
Securities
Commission

Commission des
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de l'Ontario

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Citation: Theroux (Re), 2019 ONSEC 20

Date: 2019-06-03

File No. 2019-9

**IN THE MATTER OF
ALAIN ARMAND THEROUX**

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

Hearing: In Writing

Decision: June 3, 2019

Panel: D. Grant Vingoe Vice-Chair and Chair of the Panel

Appearances: Kai Olson For Staff of the Commission

Max Muñoz For Alain Armand Theroux

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REASONS AND DECISION

I. INTRODUCTION AND BACKGROUND

- [1] On April 19, 2018, Alain Armand Theroux (**Theroux**) pleaded guilty¹ in the Ontario Court of Justice to five counts of fraud over \$5,000, contrary to section 380(1)(a) of the *Criminal Code of Canada*² (the **Criminal Code**).
- [2] Theroux's guilty plea was accepted by the Court, and he was convicted (the **Court Decision**).
- [3] Staff of the Ontario Securities Commission (**Staff** of the **Commission**) relies on the inter-jurisdictional enforcement provisions found in paragraph 1 of subsection 127(1) of the Ontario *Securities Act*³ (the **Act**) and requests that the Commission issue an order reciprocating Theroux's conviction.
- [4] The issues for me to consider are:
- a. whether one of the circumstances under subsection 127(10) of the Act applies to Mr. Theroux, namely, has Mr. Theroux been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives (s. 127(10)(1)); and if so
 - b. whether the Commission should exercise its jurisdiction to make a protective order in the public interest in respect of Mr. Theroux pursuant to subsection 127(1) of the Act.
- [5] For the reasons that follow, I find that Mr. Theroux was convicted of offences arising from a course of conduct related to securities, and that it is in the public interest to issue an order in this matter as requested by Staff, subject to one carve-out requested by Mr. Theroux.
- [6] The order is in substantially the form requested by Staff, subject to a limited carve-out to allow for Mr. Theroux to trade and acquire securities or derivatives through a registrant in certain registered and tax-free savings accounts.

II. SERVICE AND PARTICIPATION

- [7] Mr. Theroux was served via process server on March 27, 2019,⁴ with the Notice of Hearing, the Statement of Allegations, Staff's Hearing Brief,⁵ Staff's Written Submissions, and Staff's Brief of Authorities.
- [8] I find that Mr. Theroux was properly served.
- [9] Mr. Theroux participated in the hearing and was represented by counsel in this matter. Both Staff and Counsel for Mr. Theroux filed written materials in this hearing, which I have reviewed in coming to my decision.

¹ Staff's Hearing Brief marked as Exhibit 2, Transcript re: Guilty Plea Proceedings in the matter of *R v Theroux* held April 19, 2018, Tab 3 (**Guilty Plea**)

² RSC, 1985, c. C-46

³ RSO 1990 c S.5 (the **OSA**)

⁴ Exhibit 1, Affidavit of Service of Raviinder Saini, sworn March 28, 2019

⁵ Exhibit 2, Hearing Brief of Staff of the Ontario Securities Commission

III. CRIMINAL GUILTY PLEA AND SENTENCING

A. Conduct at Issue and Guilty Plea

- [10] Between August 21, 2008 and June 2, 2009, five investors provided Mr. Theroux a total of \$445,000 for investment in Organo Capital (**Organo**), a Québec based biofuel venture, with which he was associated as a “representative”.⁶
- [11] Statements were provided to investors showing their investments in bonds, promissory notes and bridge financing with purported generous returns of up to 100 per cent for a one-year term.⁷
- [12] In actuality, only \$274,800 of the funds were invested in Organo, while the remaining \$170,800 was retained by Theroux and used for his own personal purposes or to repay earlier investors.⁸
- [13] The five individuals who were defrauded were either close friends or long-time clients of Mr. Theroux,⁹ a former mutual fund sales person and branch manager with PFSL Investments Canada Ltd. (**PFSL**)¹⁰
- [14] None of the five investors received the promised returns on their investments, nor were any of the funds provided to Mr. Theroux returned to them.¹¹
- [15] On April 19, 2018, Mr. Theroux pleaded guilty before Justice Gage of the Ontario Court of Justice to five counts of fraud over \$5,000, contrary to section 380(1)(a) of the *Criminal Code*.¹²

B. Sentencing

- [16] Mr. Theroux was sentenced on July 24, 2018, to 12 months’ incarceration, followed by two years of probation.¹³ He is also subject to a restitution order in the amount of \$170,800 and a fine in lieu of forfeiture of \$75,000, to be paid within 15 years of his release. If the fine is not paid within 15 years, Mr. Theroux will be incarcerated for an additional two years.¹⁴

⁶ Exhibit 2, Guilty Plea, Tab 3, at 3 lines 10-12, 4 lines 8, 24-29

⁷ Exhibit 2, Guilty Plea, Tab 3, at 4 lines 18-21

⁸ Exhibit 2, Guilty Plea, Tab 3, at 5 lines 1-9

⁹ Exhibit 2, Guilty Plea, Tab 3, at 4 lines 5-8

¹⁰ Exhibit 2, Section 139 Certificate re: Alain Armand Theroux dated February 4, 2019, Tab 1

¹¹ Exhibit 2, Guilty Plea, Tab 3, at 3 lines 20-25

¹² Exhibit 2, Guilty Plea, Tab 3, at 1-2

¹³ Exhibit 2, Transcript re: Reasons for Sentence for the Honourable Justice Gage in the matter of *R v Theroux* held July 24, 2018, Tab 4, at 5 lines 15-17(**Sentencing**)

¹⁴ Exhibit 2, Sentencing, Tab 4, at 6 lines 5-11, 19-23

IV. ANALYSIS

A. Has Mr. Theroux been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives?

[17] Subsection 127(10) of the Act provides as follows:

(10) 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:

...

1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives.

[18] Mr. Theroux has been convicted in Ontario of five counts of fraud over \$5,000 contrary to the *Criminal Code*. Those convictions arose from transactions, a business or a course of conduct related to securities. Theroux admitted he solicited and accepted funds in excess of \$1,000,000 from investors, reflecting their investments in bonds, promissory notes and bridge financing marketed in respect of a biofuel venture with a company with which Theroux was associated. These fraudulent investments constituted investment contracts and therefore securities for purposes of the Act.¹⁵ Returns of up to 100% for a one-year term were promised. Substantial portions of the monies raised were diverted for his own personal use or to pay other investors and not invested in the biofuel venture. The five investors whose investments were used as the factual basis for Theroux's conviction turned over funds totalling \$445,000, \$178,800 of which was retained by Theroux. None of them received their promised returns or the return of their initial investments.

[19] I find that I have the authority to make a public interest order against Mr. Theroux under subsection 127(1) of the Act in reliance on subsection 127(10) of the Act, based on the Court Decision and agreed facts arising from his guilty plea.

B. What, if any, sanctions should the Commission order against Mr. Theroux?

[20] Having found that the test in subsection 127(10) of the Act has been met, I must now determine what sanctions, if any, should be ordered against Mr. Theroux.

1. Legislative framework

[21] Subsection 127(10) of the Act facilitates the inter-jurisdictional enforcement of orders imposed following breaches of securities law. The subsection does not itself empower the Commission to make an order; rather it provides a basis for an order under subsection 127(1).¹⁶

¹⁵ *Pacific Coast Coin Exchange of Canada v Ontario (Securities Commission)*, [1978] 2 SCR 112 at p. 128

¹⁶ *Euston Capital Corp (Re)*, 2009 ONSEC 23, (2009) 32 OSCB 6313 at para 46

- [22] Orders made under subsection 127(1) of the Act are “protective and preventive” and are made to restrain potential conduct that could be detrimental to the integrity of the capital markets and therefore prejudicial to the public interest.¹⁷
- [23] In determining specific sanctions, the Commission may consider, among other factors, the seriousness of the misconduct, the harm suffered by investors, specific and general deterrence and any aggravating or mitigating factors.¹⁸

2. Facts of this case

- [24] As this Commission has repeatedly held, fraud is one of the most egregious violations of securities law. It causes direct and immediate harm to its investors, and it significantly undermines confidence in the capital markets.¹⁹
- [25] In commenting on the nature and impact of Mr. Theroux’s fraud in assessing aggravating factors for the purpose of sentencing, Justice Gage stated:²⁰

The offences involved a breach of trust...[T]here are multiple victims, ...the offences were perpetrated over a lengthy period of time...[T]he conduct was planned and deliberate, and the extent of the overall investment which made the victims vulnerable.

And the impact of the fraud was devastating ...

- [26] In addition, I consider it relevant that Mr. Theroux was knowledgeable about securities regulation as a former mutual fund salesperson and branch manager and therefore would have been well aware of the consequences that could flow from his conduct. He abused the trust of investors who were either personal friends of Mr. Theroux or knew him from his mutual fund activities, or both. He also had standing in his community through community and other efforts which Justice Gage indicated helped engender the trust. This mistaken trust enabled him to secure funds from the investors, amounting in some cases to the bulk of their life savings, and to pay that money over to an account for Theroux Enterprises rather than the company in which they were told they were investing. This further enabled Mr. Theroux to divert substantial amounts for his own personal use.²¹
- [27] Justice Gage accepted that Mr. Theroux was genuinely remorseful.²² Mr. Theroux’s submissions also state his remorse, and I accept these submissions.

3. Analysis

- [28] It is important that this Commission impose sanctions that will protect Ontario investors by specifically deterring Mr. Theroux from engaging in similar or other misconduct in Ontario, and by acting as a general deterrent to other like-minded persons.

¹⁷ *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37, [2001] SCR 132 at para 42-43

¹⁸ *Belteco Holdings Inc (Re)* (1998), 21 OSCB 7743 at 7746

¹⁹ *Black Panther (Re)*, 2017 ONSEC 8, (2017) 40 OSCB 3727 at para 48

²⁰ Exhibit 2, Sentencing, Tab 4 at 2 lines 24-32, 3 lines 1-7

²¹ Exhibit 2, Sentencing, Tab 4 at 2 lines 4-13

²² Exhibit 2, Sentencing, Tab 4 at 2 line 15

- [29] Mr. Theroux does not contest the sanctions recommended by OSC Staff, subject to his request for two carve-outs discussed below.
- [30] An investment fraud of the kind perpetrated by Mr. Theroux, based on a breach of trust by a former registered securities professional with devastating consequences for some investors is among the most serious examples of misconduct that the Commission must consider. Only a permanent ban on Mr. Theroux participating in the capital markets, subject to the one carve-out discussed below, would adequately protect investors and those markets.
- [31] However, since Mr. Theroux's fraud did not involve trading activities effected through brokerage accounts, but rather the solicitation of direct investments in the biofuel enterprise, I do not consider it necessary to bar Mr. Theroux from trading in registered accounts for which he has a beneficial ownership, subject to the conditions specified below, in order provide him with the possibility of accumulating some investment savings. In addition, enabling him to save in this manner may increase the likelihood that he can free up financial resources to make restitution to the investors affected by his fraud, as ordered by Justice Gage.
- [32] Mr. Theroux also requested a carve-out to enable him to return to his role as a director of a private company he apparently owns, called Genius Innovations Canada Corp. (**Genius Innovations**) at the end of his parole term, the business of which is described in Mr. Theroux's submissions as "marketing and direct marketing services in connection with HVAC, real estate and other products and services."
- [33] Although Mr. Theroux's submissions state that it is a "private company, not involved in the public markets in any capacity", I am not prepared to grant this carve-out from the director ban. This enterprise could just as readily be used to raise capital or otherwise market investment contracts involving the HVAC business or real estate through the exempt market as the enterprise involved in the fraud Mr. Theroux committed. Preventing Mr. Theroux from being a director of this and other private companies will not prevent him from having a livelihood as an employee for Genius Innovations or other entities, provided that he does not perform the functions of, or hold himself out as a director or officer of, Genius Innovations or other entities.

V. CONCLUSION

- [34] For the reasons set out above, I find that it is in the public interest to impose the sanctions requested by Staff, with an additional carve-out to allow for Mr. Theroux to trade and acquire securities through a registrant provided they are held in certain registered and tax-free savings accounts. I will therefore order:
- a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Mr. Theroux shall cease permanently, except that this order does not preclude Mr. Theroux from trading in securities or derivatives in a registered retirement savings plan, registered education savings plan, any registered retirement income funds, and/or tax-free savings account (as defined in the *Income Tax Act* (Canada)) in which he has a beneficial ownership, provided that he carries out any permitted trading through a registered dealer (which dealer must be given a copy of this Order) and through accounts opened in his name only;

- b. pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by Mr. Theroux shall be prohibited permanently, except that this order does not preclude Mr. Theroux from purchasing securities or derivatives in a registered retirement savings plan, registered education savings plan, any registered retirement income funds, and/or tax-free savings account (as defined in the *Income Tax Act* (Canada)) in which he has a beneficial ownership, provided that he carries out any permitted acquisitions through a registered dealer (which dealer must be given a copy of this Order) and through accounts opened in his name only;
- c. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to Mr. Theroux permanently;
- d. pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act, Mr. Theroux shall resign any positions that he holds as a director or officer of any issuer or registrant;
- e. pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act, Mr. Theroux is prohibited permanently from being or acting as a director or officer of any issuer or registrant; and
- f. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Mr. Theroux is prohibited permanently from becoming or acting as a registrant or promoter.

Dated at Toronto this 3rd day of June, 2019.

"D. Grant Vingoe"

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