



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
WILLIAM RAYMOND MALONE**

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

Hearing: In writing

Decision: February 1, 2017

Panel: Monica Kowal - Vice-Chair

Appearances: Malinda Alvaro - For Staff of the Commission

No submissions were received on behalf of William Raymond Malone

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REASONS AND DECISION

I. STAFF'S REQUEST

- [1] Staff ("**Staff**") of the Ontario Securities Commission (the "**Commission**") has requested me to consider whether William Raymond Malone ("**Malone**"), who is subject to an order made by the British Columbia Securities Commission (the "**BCSC**"), should be made subject to sanctions, conditions, restrictions or requirements in Ontario pursuant to paragraph 4 of subsection 127(10) and subsection 127(1) of the *Securities Act*, RSO 1990, c S.5 (the "**Act**").
- [2] I conducted a written hearing to consider Staff's request, and these are my reasons for granting Staff's requested order.

II. PRELIMINARY MATTERS

- [3] Malone was served with the Notice of Hearing issued on November 9, 2016, a Statement of Allegations dated November 8, 2016 and Staff's disclosure.¹ Malone communicated with Staff of the Commission by e-mail on November 30, 2016, informing Staff that he disputed the validity of certain documents before the BCSC as they were not originals and that he is "in no position to hire a lawyer or function in a hearing to defend [himself]".² Staff responded by e-mail on November 30, 2016 informing Malone that at the hearing on December 1, 2016 Staff would be requesting to convert the matter to a written hearing and that Malone could contact the registrar for information to participate via teleconference and make submissions.³
- [4] Malone did not appear or otherwise participate at the hearing on December 1, 2016. On December 1, 2016, Staff of the Commission brought an application to convert the matter to a written hearing, as permitted by Rule 11 of the Commission's Rules of Procedure (2014), 37 OSCB 4168. The application was granted and a timeline was set for the exchange of materials between Staff and Malone. Malone was required to serve and file his materials by January 23, 2017.
- [5] Malone did not file evidence or make submissions in accordance with the timelines set on December 1, 2016. As set out in the Affidavit of Service of Lee Crann sworn December 12, 2016,⁴ Malone was served by courier and e-mail (which e-mail address had previously been used by Malone to correspond with Staff) with: (1) the Commission's Order dated December 1, 2016 which set out the timeline for the exchange of materials, and (2) Staff's written materials, including Staff's written Submissions, Brief of Authorities and Hearing Brief.⁵
- [6] A tribunal may proceed in the absence of a party where that party has been given notice of the hearing (Subsection 7(2), *Statutory Powers Procedure Act*, RSO 1990, c S.22 (the "**SPPA**")). Based on the evidence of service from Staff

¹ Affidavit of Lee Cran, sworn November 25, 2016, marked as Exhibit #1 during the December 1, 2016 hearing.

² Email from Malone dated November 30, 2016, marked as Exhibit #2 during the December 1, 2016 hearing.

³ Email from Staff dated November 30, 2016, marked as Exhibit #3 during the December 1, 2016 hearing.

⁴ Marked as Exhibit #4.

⁵ Staff's Hearing Brief is marked as Exhibit #5.

and Malone's communications, I am satisfied that Malone was properly served and had notice of the written hearing and that the matter may proceed in the absence of Malone's participation in accordance with the SPPA.

III. THE BCSC FINDINGS AND ORDER

[7] In its findings decision dated August 3, 2016 (*Re Malone*, 2016 BCSECOM 257 (the "**Findings**")), the BCSC Panel found that between 2010 and 2013 (the "**Material Time**") Malone breached the terms of a previous settlement agreement between Malone and the BCSC, which prohibited Malone from acting as a director or officer of any issuer and engaging in investor relations activities.

[8] Specifically, the BCSC found that:

- On January 29, 2009 Malone entered into a settlement agreement with the BCSC relating to a different matter. The resulting order (the "**January 2009 Order**") prohibited Malone from acting as a director or officer of any issuer and from engaging in investor relations activities before the later of January 29, 2012, or the date Malone successfully completed a course of study satisfactory to the BCSC's Executive Director concerning the duties and responsibilities of directors and officers. (Findings, at para 9)
- As of January 26, 2015, Malone confirmed to the BCSC that he had not completed a course of study as required by the terms of the January 2009 Order. Therefore, the terms of the January 2009 Order still remained in effect. (Findings, at para 10)
- While the terms of the January 2009 Order were still in effect, in March 2010, Malone incorporated a British Columbia company named Lion King Resources Inc. ("**Lion King**"). As of the date of the Findings, Lion King was not a reporting issuer in British Columbia. Lion King's business was to promote and develop an iron ore property in the Atacama region in Chile. (Findings, at paras 11 to 14)
- During the Material Time, Lion King had several directors, including Malone's son. However, the BCSC Panel found that Malone made most, if not all, operational decisions on behalf of the company. While the terms of the January 2009 Order were still in effect, Malone was responsible for various aspects of the Lion King's operations, including, among other things, having signing authority over Lion King's bank accounts, and negotiating contracts with respect to Lion King's acquisition of interests in mining properties in Chile. Malone also participated in the only formal meeting of the board of Lion King held in March 2013. (Findings, at paras 12, 13, 19 and 20)
- In early 2013, Lion King engaged in negotiations with a third party with respect to a joint venture. The BCSC Panel found that correspondence between Lion King board members suggested they viewed Malone as a key member of the mind and management of Lion King and its business activities. (Findings, at paras 22 and 23)
- The BCSC Panel found that Malone breached the January 2009 Order by soliciting a British Columbia resident to purchase securities in Lion King during the Material Time. Malone introduced the investor to the opportunity to purchase securities of Lion King, and provided him with samples of sand containing iron ore taken from Lion King's Chilean property. In July 2010, the

investor purchased 33,333 shares of Lion King for \$5,000. (Findings, at paras 24 and 25)

[9] Based on this misconduct, the BCSC Panel concluded that:

- (a) Malone breached the January 2009 Order while it was in effect by conducting investor relations activities in British Columbia with respect to the sale of Lion King shares (Findings, at para 35); and
- (b) Malone breached the January 2009 Order by acting as a de facto director and/or officer of Lion King. (Findings, at para 45)

[10] Subsequently, a sanctions hearing was held and the BCSC Panel ordered on October 3, 2016 (*Re Malone*, 2016 BCSECOM 334 ("**BCSC Order**") at para 25) that:

1. under sections 161(1)(d)(i) through (v) [of the British Columbia *Securities Act*, RSBC 1996, c 418 (the "**BC Act**")], Malone:
 - a) resign any positions he holds as, and is prohibited from becoming or acting as, a director or officer of any issuer;
 - b) is prohibited from becoming or acting as a registrant or promoter;
 - c) is prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and
 - d) is prohibited from engaging in investor relations activities;until the later of:
 - a) the date that Malone successfully completes a course of study satisfactory to the [BCSC's] executive director concerning the duties and responsibilities of directors and officers;
 - b) the date that Malone pays to the [BCSC] the amount in subparagraph 25(2) [of the BCSC Order]; and
 - c) October 3, 2023;
2. under section 162 of the [BC] Act, that Malone pay to the [BCSC] an administrative penalty of \$60,000.

IV. MALONE'S POSITION

[11] Malone did not provide the Commission with any evidence or submissions that would persuade the Commission that Staff's requested order is not appropriate in the circumstances.

V. DECISION

[12] In my view, it is in the public interest to grant the order requested by Staff.

[13] The threshold under paragraph 4 of subsection 127(10) is met. Malone is subject to an order made by the BCSC that imposes sanctions, conditions, restrictions or requirements upon him (see paragraph 25 of the BCSC Order).

- [14] Having found that the threshold has been met under paragraph 4 of subsection 127(10) of the Act, I must now determine what sanctions, if any, should be ordered against Malone.
- [15] 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 to make an order under subsection 127(1), and if so, what the order ought to be.
- [16] The purpose of section 127 of the Act, and the principles that should “animate” its application, were reviewed by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SCR 132 (“**Asbestos**”). The Supreme Court found that when considering whether to make a public interest order, the Commission shall have regard to the purposes of the Act set out in section 1.1 to provide protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in capital markets (*Asbestos*, at para 41). Further, the Supreme Court stated that the purpose of section 127 is “neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario’s capital markets” (*Asbestos*, at para 42).
- [17] While the Commission must make its own determination of what is in the public interest, it is also important that the Commission be aware of and responsive to an interconnected, inter-provincial securities industry. Comity requires that there not be barriers to recognizing and reciprocating the order of other regulatory authorities when the findings of the other jurisdiction qualify under subsection 127(10) of the Act. For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low (*Re JV Raleigh Superior Holdings Inc.* (2013), 36 OSCB 4639 at paras 21-26; *New Futures Trading International Corp.* (2013), 36 OSCB 5713 at paras 22-27; and *McLean v British Columbia (Securities Commission)*, [2013] 3 SCR 895 at paras 54 and 69).
- [18] In my view, Staff’s requested order is appropriate for the following reasons:
- Malone was found by the BCSC Panel to have intentionally breached the January 2009 Order. Specifically, the BCSC Panel found this to be serious misconduct and stated at paragraphs 7 and 8 of the BCSC Order:

Orders made following enforcement proceedings are an integral part of the Commission's regulatory function. If those who are subject to these orders can simply ignore them with impunity then the enforcement role of the Commission would be greatly impaired.
- The respondent incorporated Lion King but made his son, who had no previous experience being an officer or director of a company or in the mineral exploration business, the sole director of the company. The respondent participated in the only formal meeting of the board of Lion King. His son did not. The respondent knew that he was prohibited from acting in the capacity of a director or officer of an issuer so he structured his affairs to appear to be in compliance with the [January 2009 Order] by not being formally appointed as a director or officer of Lion King. At the same time,

however, he was performing the functions of a *de facto* officer and/or *de facto* director of Lion King, ultimately engaging in the very conduct prohibited by the [January 2009 Order]. It is clear that the respondent's breach of the [January 2009 Order] was intentional. Therefore, the respondent's breach of the [January 2009 Order] is serious misconduct.

- The terms of Staff's requested order are consistent with the fundamental principle that the Commission maintain high standards of fitness and business conduct to ensure honest and responsible conduct by market participants. I note that the BCSC Panel found at paragraphs 13 and 14 of the BCSC Order that:

The respondent represents a significant risk to our capital markets. He was previously sanctioned for misconduct in our capital markets and, despite the [January 2009 Order], simply carried on conduct in breach of the regulatory restrictions imposed on him. This raises questions about whether Malone will allow himself to be regulated.

Malone's misconduct has arisen in the context of his acting as an officer and/or director, or a *de facto* officer and/or *de facto* director of an issuer. This raises significant concern about his fitness to be an officer or director of an issuer. The proper functioning of our capital markets requires that those who are officers or directors of issuers need to act honestly and with integrity. Those that circumvent the orders of the Commission and attempt to disguise their actions are not individuals who should be in management roles.

- The terms of Staff's requested order align with the sanctions for trading and market prohibitions imposed by the BCSC Panel to the extent possible under the Act.
- The sanctions proposed by Staff are prospective in nature, and would impact the Respondent only if he attempted to participate in the capital markets of Ontario.

[19] Taking into consideration the nature of the misconduct engaged in, the importance of inter-jurisdictional cooperation among securities regulatory authorities in Canada, and the need to deter Malone from engaging in similar misconduct in Ontario, I conclude that an order ought to be made in the public interest pursuant to the authority provided in subsection 127(1) of the Act. I therefore order that:

- i. Malone resign any positions that he holds as a director or officer of any issuer, pursuant to paragraph 7 of subsection 127(1) of the Act;
- ii. Malone is prohibited from becoming or acting as a director or officer of any issuer, pursuant to paragraph 8 of subsection 127(1) of the Act; and

- iii. Malone is prohibited from becoming or acting as a registrant, investment fund manager or promoter, pursuant to paragraph 8.5 of subsection 127(1) of the Act;
- iv. The sanctions listed in ii. and iii. shall apply until the later of:
 - 1. the date that Malone successfully completes a course of study satisfactory to the BCSC's Executive Director concerning the duties and responsibilities of directors and officers;
 - 2. the date that Malone pays to the BCSC the administrative penalty ordered in subparagraph 25(2) of the BCSC Order; and
 - 3. October 3, 2023.

Dated at Toronto this 1st day of February 2017.

"Monica Kowal"

Monica Kowal