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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 KRIS SUNDELL

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

Decision:	November 27, 2014	
Panel:	James E. A. Turner	- Vice-Chair of the Commission
Counsel:	Keir Wilmut	- For Staff of the Commission

TABLE OF CONTENTS

I. OVERVIEW **1**

II. AGREED STATEMENT OF FACTS **2**

III. ANALYSIS **3**

A. SUBSECTION 127(10) OF THE ACT 3
B. SUBMISSIONS OF STAFF 4
C. SHOULD AN ORDER BE ISSUED? 4
D. THE APPROPRIATE RESTRICTIONS 5

IV. CONCLUSION **7**

Schedule "A" – Form of Order

REASONS FOR DECISION

I. OVERVIEW

[1] This was a hearing (the "**Hearing**") conducted in writing before the Ontario Securities Commission (the "**Commission**") 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 market conduct restrictions against Kris Sundell (the "**Respondent**" or "**Sundell**").

[2] A Notice of Hearing in this matter was issued by the Commission on July 21, 2014 and a Statement of Allegations was filed by Staff of the Commission ("**Staff**") on the same date. Both the Notice of Hearing and the Statement of Allegations were duly served on the Respondent.

[3] On August 18, 2014, the Commission heard an application 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 OSCB 10071, and section 5.1(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended. The Respondent was duly served with that application but did not appear at the application hearing or make any submissions.

[4] The Commission granted Staff's application to proceed by way of written hearing and set a schedule for submission of materials by the parties.

[5] Staff filed written submissions, a hearing brief and a brief of authorities. The Respondent did not appear and did not file any responding materials.

Facts

[6] On February 20, 2014, Sundell entered into a settlement agreement with the Alberta Securities Commission (the "**ASC**") (the "**Settlement Agreement**").

[7] Pursuant to the Settlement Agreement, Sundell agreed to certain undertakings and to be made subject to sanctions, conditions, restrictions or requirements.

[8] The conduct for which Sundell was sanctioned occurred between January 1, 2011 and June 30, 2011 (the "**Material Time**").

[9] During the Material Time, Sundell was a resident of Calgary, Alberta. Sundell was a former investment advisor and he admitted in the Settlement Agreement that he breached subsections 93(a)(i) and (a)(ii) of the Alberta *Securities Act*, R.S.A. 2000, c. S-4 ("**ASA**") by engaging in a course of conduct relating to securities of Teras Resources Inc. ("**Teras**") that he knew or reasonably ought to have known resulted in a false and misleading appearance of trading activity and in an artificial price. He also admitted that his trading activity was conduct contrary to the public interest.

[10] These are my reasons for the market conduct restrictions I impose pursuant to subsections 127(1) of the Act in reliance on subsection 127(10)5 of the Act.

II. AGREED STATEMENT OF FACTS

[11] In the Settlement Agreement, Sundell agreed to the following facts (the "**Agreed Facts**"):

(a) Sundell is a 38 year-old resident of Calgary, Alberta. From approximately 2001 to 2006, he was employed as an investment advisor at a national investment broker with offices in Calgary. It was during this period that he first met a fellow employee and investment advisor named Peter Leger ("**Leger**");

(b) in September 2008, Sundell incorporated Strategic Capital International Inc. ("**Strategic**"). He was its sole director, shareholder, and representative. Sundell described Strategic as being involved in market expansion and financings;

(c) in 2009, Sundell and Leger had discussions concerning a possible business relationship. In March 2010, a consulting agreement was entered into between Strategic and Teras. At all material times, Leger was the president and CEO of Teras, a publicly-traded company. Pursuant to the agreement, Strategic was to start an "awareness" campaign to increase public interest in Teras through telephone calls and e-mails;

(d) from 2009 to early 2011, Sundell, through Strategic, assisted Teras with private placements and received finder's fees and, in some cases, shares, warrants or options for Teras shares. Strategic also received consulting fees from Teras;

(e) During this period, Sundell opened a self-directed trading account for Strategic with Scotia Capital Inc. ("**Scotia**") (the "**Account**"). Sundell had sole trading authority and executed all orders in the Account;

(f) From January 1, 2011 to June 30, 2011, Sundell traded shares of Teras in the Account. The Account only ever held and traded Teras shares;

(g) Sundell received some direction from Leger with respect to Sundell's trading in Teras shares in the Account. On occasion, Leger would call Sundell late in the trading day and tell him it would be great for the Teras stock to close high that day, or words to that effect. Sundell also made high closing trades without direction, believing that was expected of him by Leger, and wanting to protect his investment in Teras;

(h) In early May 2011, Scotia contacted Sundell with concerns that he had engaged in high closes in the Account. He was referred to Uniform Market Integrity Rule 2 (2.2) and asked to modify his trading. Following two more high closes on May 26 and 27, 2011, Sundell was asked to leave Scotia; and

(i) In June 2011, Scotia sent a "Gatekeeper Report" concerning Sundell's trading to the Investment Industry Regulatory Organization of Canada. On

June 30, 2011, Sundell made arrangements to close the Account and move the Teras shares to another brokerage.

The Terms of Settlement

[12] Pursuant to the Settlement Agreement, Sundell agreed to certain undertakings and to be made subject to sanctions, conditions, restrictions or requirements under the ASA as follows:

(a) Sundell pay to the ASC the amount of $40,000;

(b) Sundell pay to the ASC the amount of $5,000 towards investigation and legal costs; and

(c) Sundell cease trading in or purchasing securities for a period of five years.

[13] Sundell acknowledged and agreed that the Settlement Agreement "may be referred to ... in securities regulatory proceedings in other jurisdictions."

III. ANALYSIS

A. Subsection 127(10) of the Act

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

> **127 (10) Inter-jurisdictional enforcement** – 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:
>
> …
>
> 5. The person or company has agreed with a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, to be made subject to sanctions, conditions, restrictions or requirements.

[15] Based on the Agreed Facts and the terms of settlement, it is apparent that Sundell agreed with the ASC to be made subject to sanctions, conditions, restrictions or requirements, within the meaning of paragraph 5 of subsection 127(10) of the Act. Accordingly, the Commission is entitled to make one or more orders under subsections 127(1) or 127(5) of the Act, if in its opinion it is in the public interest to do so. (See *Re Euston Capital Corp.* (2009), 32 OSCB 6313)

[16] I therefore find that I have the authority to make a public interest order against the Respondent under subsection 127(1) of the Act in reliance on subsection 127(10) of the Act.

[17] I must determine whether, based on the Settlement Agreement, imposing the market conduct restrictions requested by Staff would be in the public interest. An important consideration is that the respondent's conduct would have constituted a breach of the Act and/or would have been considered to be contrary to the public interest if the conduct occurred in

Ontario. (*JV Raleigh Superior Holdings Inc., Re* (2013), 36 OSCB 4639 at para. 16 ("***JV Raleigh***"))

B. Submissions of Staff

[18] In order to protect Ontario investors and capital markets, Staff submits that it is in the public interest for the Commission to impose market conduct restrictions on the Respondent consistent with the sanctions agreed to in the Settlement Agreement.

[19] Staff requests the following sanctions against Sundell:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Sundell cease until February 20, 2019; and

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Sundell cease until February 20, 2019.

[20] Staff submits that I am entitled to issue an order imposing those market conduct restrictions based solely on the evidence before me, which consists of the Settlement Agreement and the Agreed Facts.

C. Should an Order be Issued?

[21] 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 subsection 1.1 of the Act, are:

(a) to protect investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets.

[22] In pursuing these purposes, I must have regard to 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 are restrictions on unfair, improper and fraudulent market practices.

[23] The Divisional Court in *Erikson v. Ontario (Securities Commission)* acknowledged that "participation in the capital markets is a privilege and not a right" (*Erikson* v. *Ontario (Securities Commission),* [2003] O.J. No. 593 (Div. Ct.) at para. 55).

[24] An order under section 127 of the Act is protective and preventative in nature. As stated in *Re Mithras Management Ltd.* (1990), 13 OSCB 1600 at 1610-1611:

> … the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now section 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public

> interest in having capital markets that are both fair and efficient. In doing so we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.

[25] While the Commission must make its own determination of what is in the public interest, it is important that the Commission recognize the increasingly complex and cross-jurisdictional nature of securities markets. (*JV Raleigh*, *supra*, at paras. 21-26, and *New Futures Trading International Corp.* (2013), 36 OSCB 5713 at paras. 22-27)

[26] In imposing the market conduct restrictions in this matter, I am relying on the Settlement Agreement and the Agreed Facts. It is not appropriate in doing so to revisit or second-guess the terms of settlement.

[27] I find that it is necessary and appropriate to protect Ontario investors and the integrity of Ontario's capital markets to impose market conduct restrictions against the Respondent in the public interest.

D. The Appropriate Restrictions

[28] In determining the nature and duration of the appropriate market conduct restrictions, I must consider all of the relevant facts and circumstances before me, including:

(a) the seriousness of the Respondent's conduct and breaches of the ASA;

(b) the harm to investors;

(c) whether or not the restrictions imposed may serve to deter the Respondent or others from engaging in similar abuses of Ontario investors and Ontario capital markets; and

(d) the effect any Ontario restrictions may have on the ability of the Respondent to participate without check in Ontario capital markets.

(See, for instance, *Re Belteco Holdings Inc.* (1998), 21 OSCB 7743 ("***Belteco***") at paras. 25 and 26.)

[29] The following facts and circumstances are particularly relevant in determining the sanctions that should be ordered against Sundell:

(a) the Respondent admitted to breaching Alberta securities law; and

(b) the conduct for which the Respondent was sanctioned would constitute a contravention of Ontario securities law if it had occurred in Ontario, specifically a contravention of subsection 126.1(l)(a) of the Act.

[30] Further, Sundell was warned by Scotia in early May 2011 that he had engaged in high closes in the Account. Sundell was referred to Uniform Market Integrity Rule 2 (2.2) and was

asked to change his trading activity. Sundell ignored that warning and engaged in an additional two high closes at the end of May 2011, at which time, Sundell was asked to leave Scotia.

[31] As mitigating factors, it is stated in the Settlement Agreement that Sundell had no previous regulatory history and co-operated with ASC Staff in their investigation.

[32] I have reviewed the Commission and other decisions on sanctions referred to me by Staff in assessing the market conduct restrictions appropriate in this case. In reviewing those decisions, I note that each case depends upon its particular facts and circumstances (*Re M.C.J.C. Holdings Inc.* (2002), 25 OSCB 1133 at paras. 9 and 10 and *Belteco, supra,* at para. 26).

[33] In *British Columbia (Securities Commission) v. McLean* (2011) BCCA 455 ("***McLean***") the British Columbia Court of Appeal held that when reciprocating an order originally made in Ontario, the British Columbia Securities Commission has a duty to provide reasons, however brief, for the sanctions it was imposing and why they were in the public interest. (*McLean*, *supra*, at paras. 28-29).

[34] In *Lines v. British Columbia (Securities Commission),* (2012) BCCA 316 ("***Lines***"), the British Columbia Court of Appeal interpreted *McLean* as holding that the Commission "must make its own determination of the public interest under s. 161 [section 127 of the Act], rather than make an order automatically based on the order of the foreign jurisdiction" (*Lines, supra*, at para. 31).

[35] The Commission held in *Elliott, Re* (2009), 23 OSCB 6931 at para. 24 ("***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."

[36] While the Commission may rely on the findings of the other jurisdiction, it must satisfy itself that an order is necessary or appropriate 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)

[37] In matters such as this, the Commission has relied on the findings made in other jurisdictions and has not required that the misconduct be directly connected to Ontario or Ontario capital markets *(Weeres, Re* (2013), 36 OSCB 3608 and *Shantz (Re)* (2013), 36 OSCB 5993).

[38] Staff submits that the market conduct restrictions imposed in the Settlement Agreement are appropriate to the misconduct of the Respondent and serve as both specific and general deterrence. Staff further submits that a protective order imposing market conduct restrictions on

the Respondent, substantially similar to those imposed under the Settlement Agreement, are necessary and appropriate to protect Ontario investors and Ontario capital markets from similar misconduct by the Respondent.

Submission of the Respondent

[39] Staff seeks an order stating that, among other matters, "pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Sundell cease until February 20, 2019." In an e-mail to Staff dated August 18, 2014, Sundell requested that, so as to mirror the terms of the Settlement Agreement, the Ontario order instead state that "pursuant to paragraph 2.1 of subsection 127(1) of the Act, the *purchase* of any securities by Sundell cease until February 20, 2019". [emphasis added]

[40] Staff submits that Sundell's proposed amendment to the Order is not appropriate. If the Panel finds that the facts admitted to by Sundell in the Settlement Agreement are sufficient to impose sanctions under the Act, Staff submits that the sanctions imposed should be those set out in the Act. In this case, paragraph 2.1 of subsection 127(1) of the Act refers to the *acquisition* of any securities.

[41] It is not clear to me what the effect of the change requested by the Respondent is intended to be. If my order in this matter restricts trading activity that is permitted under the Settlement Agreement, the Respondent is entitled to bring an exemption application to the Commission in respect of that trading activity. I am not suggesting, however, that such exemption should necessarily be granted.

[42] 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 imposing the following market conduct restrictions on Sundell:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Sundell cease until February 20, 2019; and

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Sundell cease until February 20, 2019.

IV. CONCLUSION

[43] Accordingly, I find that it is in the public interest to issue an order in the form attached as Schedule "A" to these reasons.

DATED at Toronto this 27th day of November, 2014.

"James E. A. Turner"

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James E. A. Turner

Schedule "A"

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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 KRIS SUNDELL

ORDER
(Subsections 127(1) and 127(10))

WHEREAS on July 21, 2014, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing in this matter pursuant to sections 127(1) and 127(10) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in respect of Kris Sundell (the "Respondent" or "Sundell");

AND WHEREAS Staff of the Commission ("Staff") filed a Statement of Allegations in this matter on the same date;

AND WHEREAS on February 20, 2014, Sundell entered into a settlement agreement (the "Settlement Agreement") with the Alberta Securities Commission (the "ASC");

AND WHEREAS the Respondent is subject to sanctions, conditions, restrictions or requirements imposed upon him pursuant to the Settlement Agreement;

AND WHEREAS on August 18, 2014, the Commission granted Staff's application to convert this matter to a written hearing in accordance with Rule 11.5 of Commission's *Rules of Procedure* (2012), 35 OSCB 10071 and section 5.1(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended;

AND WHEREAS Staff filed written submissions, a hearing brief and a brief of authorities;

AND WHEREAS Sundell did not appear and did not file any materials;

AND WHEREAS based on my reasons dated the date of this Order, I find that it is in the public interest to issue this Order pursuant to subsection 127(1) of the Act in reliance upon subsection 127(10) of the Act;

IT IS HEREBY ORDERED THAT:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Sundell cease until February 20, 2019; and

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Sundell cease until February 20, 2019.

DATED at Toronto this 27th day of November, 2014.

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James E. A. Turner