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 ouest
Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- and -

IN THE MATTER OF
WILLIAM McDONALD FERGUSON

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

Decision:	October 7, 2015	
Panel:	Mary G. Condon	- Commissioner
Submissions by:	Keir D. Wilmut	- For Staff of the Commission

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I. OVERVIEW

[1] This was a hearing conducted in writing before the Ontario Securities Commission (the "**Commission** or **OSC**") 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 sanctions against William McDonald Ferguson ("**Ferguson**" or the "**Respondent**").

[2] A notice of hearing (the "**Notice of Hearing**") in this matter was issued by the Commission on September 22, 2014 in relation to a statement of allegations (the "**Statement of Allegations**") filed by Staff of the Commission ("**Staff**") on the same date.

[3] On October 24, 2014, the Commission heard an application (the "**Application Hearing**") 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 O.S.C.B. 10071 ("***Rules of Procedure***"), and subsection 5.1(2) of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S. 22, as amended (the "***SPPA***"). The Respondent did not appear at the Application Hearing, despite being provided with the Notice of Hearing, Statement of Allegations and disclosure. On October 24, 2014, the Commission issued an order (the "**October 24 Order**"), stating that it would grant Staff's request subject to Ferguson's right to object under the *Rules of Procedure*.

[4] Staff filed an Affidavit of Lee Crann, sworn November 12, 2014, confirming service of the October 24 Order on Ferguson as of November 3, 2014. On November 17, 2014, the Commission made an order granting Staff's application to proceed by written hearing (the "**November 17 Order**").

[5] Staff filed written submissions, a hearing brief and a brief of authorities, as well as an Affidavit of Lee Crann, sworn December 3, 2014, confirming service of the November 17 Order on Ferguson. The Respondent did not file any responding materials. I am satisfied that the Respondent was provided with notice of the November 17 Order. Pursuant to Rule 7.1 of the Commission's *Rules of Procedure* and subsection 7(2) of the *SPPA*, I may proceed in the absence of the Respondent.

[6] These are my reasons and decision with respect to the sanctions sought by Staff in this matter.

II. THE SETTLEMENT AGREEMENT AND BCSC ORDER

[7] On June 3, 2014, Ferguson entered into a settlement agreement (*Black Gold Resources Ltd. (Re)* 2014 B.C.S.E.C.C.O.M. 197) (the "**Settlement Agreement**") with the British Columbia Securities Commission (the "**BCSC**") pursuant to which he agreed to be made subject to various sanctions, conditions, restrictions or requirements. Ferguson is subject to an order made by a panel of the BCSC (the "**BCSC Panel**") on June 4, 2014 (*Black Gold Resources Ltd.*

(Re) 2014 B.C.S.E.C.C.O.M. 197) (the "**BCSC Order**") that imposes sanctions, conditions, restrictions or requirements on him.

The Settlement Agreement

[8] The conduct for which Ferguson was sanctioned occurred between March 2012 and September 2013 (the "**Material Time**").

[9] During the Material Time, Ferguson was a resident of British Columbia and the sole director of Black Gold Resources Ltd. ("**Black Gold**").

[10] In the Settlement Agreement Ferguson agreed to the following facts:

[11] Ferguson created the Black Gold Limited Partnerships to pool investor funds to invest in the oil and gas industry. Black Gold acted as the managing partner of the Black Gold Limited Partnerships.

[12] Ferguson relied on the private issuer exemption to distribute the securities of the Black Gold Limited Partnerships, raising $625,000 from 11 investors (the "**Black Gold LP Investors**"). Ferguson used the funds raised for the Black Gold Limited Partnerships to invest in a Saskatchewan-based oil exploration and production company (the "**Oil Company**").

[13] Ferguson reviewed and assessed the merits of the securities offered by the Oil Company on behalf of the Black Gold LP Investors.

[14] Ferguson deducted a management fee of 20% from the distributions made by the Oil Company prior to distributing the funds back to the Black Gold LP Investors, in proportion to their share of the investments.

[15] Ferguson also purchased a Guaranteed Investment Certificate (the "**GIC**") with the funds of two Black Gold LP Investors, which he held for a period of approximately four months. Ferguson used his discretion over investor funds to purchase the GIC, without the knowledge or consent of the two investors.

[16] Black Gold and Ferguson engaged in a course of conduct that was similar to that of an adviser, including, assessing the merits of investments, taking fees, and engaging in discretionary investing. The Respondents' failure to register prior to undertaking these activities was a breach of section 34 of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 (the "**BC Act**").

[17] Ferguson also agreed to the following undertaking (the "**Undertaking**"):

(a) reimburse the Black Gold LP Investors by returning the Management Fees;

(b) not collect any more Fees;

(c) return the GIC Interest Income to the two affected Black Gold LP Investors;

(d) within 90 days of the Order defined in paragraph 2 of the Settlement Agreement, provide the Executive Director:

(i) an accounting of the portion of the Management Fees returned to each of the Black Gold LP Investors and the portion of the GIC Interest Income returned to the two affected Black Gold investors; and

(ii) proof that the Management Fees and GIC Interest Income have been returned to the Black Gold Investors and the two affected Black Gold LP investors, respectively; and

(e) pay $5,000 to the BCSC, in respect of the settlement.

(*Settlement Agreement*, at page 4 of Staff's Hearing Brief, Tab 1.)

The BCSC Order

[18] The BCSC Order imposes the following sanctions, conditions, restrictions or requirements upon Ferguson:

(a) pursuant to section 161(1)(a) of the BC Act, that Ferguson comply with the BC Act, the *Securities Rules*, BC Reg. 194/97, and any applicable regulations;

(b) pursuant to section 161(1)(b) of the BC Act, that Ferguson cease trading in any securities, for a period of three years from the date of the [BCSC Order], except that Ferguson may trade in securities through one account in his own name with a person registered to trade in securities under the [BC Act], if he has first provided the registered representative with a copy of the [BCSC Order] before any trade takes place; and;

(c) pursuant to section 161(1)(d)(iii) of the Act, that Ferguson is prohibited from becoming or acting as an adviser,

until the later of:

(iii) three years from the date of the [BCSC Order];

(iv) the date Ferguson becomes registered under the [BC Act];

(v) the date Ferguson complies with his undertakings to:

1. reimburse the Black Gold LP Investors by returning the Management Fees, as set out in paragraph 1, item 20(a) [of the Settlement Agreement];

2. return the GIC Interest Income to the two affected Black Gold LP Investors, as set out in paragraph 1, item 20(c) [of the Settlement Agreement]; and

3. pay to [the BCSC] the sum of $5,000, as set out in paragraph 1, item 20(e) [of the Settlement Agreement].

III. SUBMISSIONS OF THE PARTIES

Staff's Submissions

[19] Staff submits that it is in the public interest for the Commission to exercise its inter-jurisdictional enforcement authority under subsection 127(10) of the *Act* to protect investors in Ontario and Ontario's capital markets from potential misconduct by Ferguson and that sanctions substantially similar to those imposed by the BCSC Order be imposed on the Respondent.

[20] Staff submits that the sanctions imposed in the BCSC Order are proportionate to the misconduct of the Respondent, and serve as both specific and general deterrence. Staff further submits that a protective order imposing conditions on the Respondent substantially similar to those imposed by the BCSC Order are required to protect investors in Ontario and Ontario's capital markets from similar misconduct by the Respondent.

[21] Staff submits that it does not have any evidence to suggest that investors in Ontario were harmed by the Respondent's conduct. However, Staff argues that the Commission needs to be aware of and responsive to an increasingly complex and interconnected inter-provincial securities industry. Accordingly, Staff respectfully submits that it is in the public interest to protect investors in Ontario from the Respondent by preventing or limiting his participation in Ontario's capital markets.

[22] Staff submit that the following sanctions be imposed on the Respondent:

(a) pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities by Ferguson cease until June 4, 2017, except that Ferguson may trade in securities through one account in his own name with a person registered to trade in securities under the *Act*, if he has first provided the registered representative with a copy of the BCSC Order, and a copy of the Order of the Commission in this proceeding, if granted, before any trade takes place; and

(b) pursuant to paragraph 1 of subsection 127(1) of the *Act*, any registration granted to Ferguson under Ontario securities law be prohibited until the later of:

(i) three years from the date of the BCSC Order;

(ii) the date Ferguson becomes registered under the BC Act;

(iii) the date Ferguson complies with his undertakings, as set out in the Settlement Agreement, to:

1. reimburse the Black Gold LP Investors by returning the Management Fees, as set out in paragraph 1, item 20(a) of the Settlement Agreement;

2. return the GIC Interest Income to the two affected Black Gold LP Investors, as set out in paragraph 1, item 20(c) of the Settlement Agreement; and

3. pay to the BCSC the sum of $5,000, as set out in paragraph 1, item 20(e) of the Settlement Agreement.

Respondents' Submissions

[23] The Respondents did not appear and did not make any submissions in this proceeding.

IV. ANALYSIS

A. Inter-jurisdictional Enforcement

[24] The relevant pre-conditions to be met for an inter-jurisdictional order are articulated in paragraphs 4 and 5 of subsection 127(10) of the *Act*. An order may be made if:

> 4. The person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.
>
> 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.

[25] The Commission held in *Elliott (Re)* (2009), 23 O.S.C.B. 6931 ("***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." (*Elliott* at para. 24)

[26] Pursuant to the BCSC Order, the Respondent is subject to sanctions, conditions, restrictions or requirements within the meaning of paragraph 4 of subsection 127(10) of the *Act*. Accordingly, based on the BCSC Order, the Commission may make one or more orders under subsection 127(1) of the *Act*, if in its opinion it is in the public interest to do so.

[27] Pursuant to the Settlement Agreement, the Respondent has agreed to be made subject to sanctions, conditions, restrictions or requirements within the meaning of paragraph 5 of subsection 127(10) of the *Act*. Accordingly, based on the Settlement Agreement, the Commission may make one or more orders under subsection 127(1) of the *Act*, if in its opinion it is in the public interest to do so.

[28] In *Euston Capital Corp. (Re)* (2009), 32 O.S.C.B. 6313 ("***Euston Capital***"), the Commission concluded that subsection 127(10) of the *Act* can be the basis for an order in the public interest under subsection 127(1) of the *Act*:

> … we conclude that we can make an order against the Respondents pursuant to our public interest jurisdiction under section 127 of the *Act* on the basis of decisions and orders made in other jurisdictions, if we find it necessary in order to protect investors in Ontario and the integrity of Ontario's capital markets.
>
> (*Euston Capital*, *supra*, at para. 46.)

[29] While a panel may rely on the findings of the other jurisdiction, it must then satisfy itself that an order for sanctions is necessary 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.)

[30] The Commission has relied on the findings made in other jurisdictions, and has not required a nexus to Ontario, when considering the imposition of a reciprocal order. However, while a nexus to Ontario is not a necessary pre-condition to the Commission's jurisdiction to make an order in the public interest, it is a factor that may be considered by the Commission in determining whether to make such an order (*Euston, supra* at para. 42 citing *Biller (Re)* (2005), 28 O.S.C.B. 10131 at para. 32; *Reeves (Re)* (2012), 35 O.S.C.B. 5140 at para. 8).

B. The Commission's Discretion to Determine Sanctions

[31] I may make an order against the Respondent under section 127 of the Act based on the Settlement Agreement and BCSC Order if I find it necessary in order to protect investors in Ontario and the integrity of Ontario's capital markets.

[32] The BCSC Order imposed significant sanctions on the Respondent. As previously indicated, Staff submits that the Commission should exercise its discretion to impose sanctions substantially similar to those imposed in the BCSC Order to the extent possible under the *Act*.

[33] The Commission must also ensure that the sanctions imposed in a case are proportionate to the circumstances and the conduct of the respondent (*Coventree Inc., Geoffrey Cornish and Dean Tai (Re)* (2012), 35 O.S.C.B. 119 at para. 46).

Mitigating Factors

[34] The Settlement Agreement included three mitigating circumstances that were taken into consideration by the Executive Director of the BCSC.

[35] Ferguson structured Black Gold pursuant to legal advice. However, his lawyer did not advise him that the limited partnership structure, which allowed him to charge a fee to the Black Gold LP Investors, would result in a breach of section 34 of the BC Act if he did so.

[36] Ferguson immediately stopped charging the Black Gold LP Investors any management fee when BCSC Staff contacted him in October 2013.

[37] Ferguson fully co-operated with BCSE Staff in their investigation.

C. Should Sanctions be Imposed in Ontario?

[38] 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 section 1.1 of the *Act*, are:

> (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.

[39] In pursuing these purposes, I must have regard for 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* is to restrict fraudulent and unfair market practices and procedures. Another fundamental principle is that:

> [t]he integration of capital markets [be] supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.
>
> (*Act, supra* at subsection 2.1(5).)

[40] The principles that guide the Commission in exercising its public interest jurisdiction are reflected in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 S.C.C. 37 ("***Asbestos***") where the Supreme Court of Canada considered the nature of section 127:

> [I]t is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive….
>
> …[t]he purpose of an order under s. 127 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."
>
> (*Asbestos,* at paras. 42-43, citing *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600.)

[41] In light of the BCSC Order and the Settlement Agreement, I find that it is necessary to order sanctions against the Respondent in the public interest, to protect investors in Ontario and the integrity of Ontario's capital markets. I consider specific aspects of the BCSC Order and Settlement Agreement below. Moreover, I have the authority to make a public interest order under subsections 127(1) and 127(10) of the *Act*, based on the Settlement Agreement and the BCSC Order.

D. The Appropriate Sanctions

[42] In determining the nature and duration of the appropriate sanctions in this case, I must consider all of the relevant facts and circumstances before me. Previous decisions of the Commission have considered a list of factors to be considered in sanctions decisions. The factors I consider most relevant to this case are:

(a) the seriousness of the misconduct and the breaches of the BC Act.;

(b) the level of the respondent's activity in the marketplace;

(c) whether or not there has been a recognition of the seriousness of the improprieties;

(d) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746; *M.C.J.C. Holdings (Re)* (2002), 25 O.S.C.B. 1133 at p. 1134.)

Seriousness of the Misconduct

[43] The Respondent admitted to breaching British Columbia securities law by engaging in unregistered advising. In Ontario, as in British Columbia, individuals are required to register in order to ensure that they meet the level of integrity and proficiency required to maintain the trust of the investing public in the capital markets. Advising in the absence of satisfying registration requirements is serious misconduct.

Level of Respondent's Activity in the Marketplace

[44] The Respondent created a sophisticated investment scheme that allowed him to collect fees for advising on securities transactions and to engage in discretionary trading on behalf of his clients. Though only a limited number of investors were involved, the activity persisted for more than a year.

Whether or not there has been a Recognition of the Seriousness of the Improprieties

[45] By entering into the Settlement Agreement, the Respondent has, in my view, recognized the seriousness of the allegations.

Mitigating Factors

[46] The BCSC Panel identified a number of factors that mitigated the severity of sanctions against the Respondent. The BCSC Panel found that (i) the Respondent received advice from his legal counsel about the Black Gold partnership structure, but also that the lawyer did not advise the Respondent that the limited partnership structure would be contrary to the BC Act; (ii) the Respondent and Black Gold stopped charging a 20% management fee to investors in October 2013, after Staff of the BC Commission contacted him; and (iii) the Respondent fully co-operated with Staff of the BC Commission throughout their investigation. I find that these factors mitigate the severity of any sanctions to be imposed in Ontario.

[47] 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*. In imposing sanctions, I rely on the BCSC Order.

V. CONCLUSION

[48] Accordingly, I find it is in the public interest to issue the following orders upon the Respondent:

(a) pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities by Ferguson in Ontario shall cease until June 4, 2017, except that Ferguson may trade in securities through one account in his own name with a person registered to trade in securities under the *Act*, if he has first provided the registered representative with a copy of the BCSC Order, and a copy of the Order of the Commission in this proceeding before any trade takes place; and

(b) pursuant to paragraph 1 of subsection 127(1) of the *Act*, Ferguson shall be prohibited under Ontario securities law from being registered in any category from which he is prohibited by the BCSC Order until the later of:

    (i) three years from the date of the BCSC Order;

    (ii) the date Ferguson becomes registered under the BC Act;

    (iii) the date Ferguson complies with his undertakings, as set out in the Settlement Agreement.

Dated at Toronto this 7th day of October, 2015.

"Mary G. Condon"

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Mary G. Condon