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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 EUSTON CAPITAL CORP. AND GEORGE SCHWARTZ**

**REASONS AND DECISION**
**Section 127 of the *Securities Act*, R.S.O. 1990 c. S.5**

| | | |
|---|---|---|
| **Hearing:** | March 19 and April 1, 2009 | |
| **Decision:** | July 29, 2009 | |
| **Panel:** | Wendell S. Wigle, Q.C.<br>Suresh Thakrar | - Commissioner (Chair of the Panel)<br>- Commissioner |
| **Counsel:** | Yvonne Chisholm | - for Staff of the Ontario Securities Commission |
| | Julia Dublin | - for Euston Capital Corp. and George Schwartz |

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## REASONS AND DECISION

# I. OVERVIEW

## A. Background

[1] This was a hearing before the Ontario Securities Commission (the "Commission") on March 19 and April 1, 2009 pursuant to section 127 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 certain sanctions against Euston Capital Corp. ("Euston") and George Schwartz ("Schwartz") (together, the "Respondents").

[2] This matter arose out of a temporary order issued by the Commission on May 1, 2006, which ordered that all trading in securities of Euston cease, that any trading in securities by Euston and Schwartz cease, as well as that any exemptions contained in Ontario securities law do not apply to the Respondents (the "Temporary Order").

[3] A Notice of Hearing was issued by the Commission on May 2, 2006, in relation to a Statement of Allegations issued by Staff of the Commission ("Staff") on the same date.

[4] The Temporary Order was subsequently extended on May 11, June 9, and October 17, 2006. On December 4, 2006, the Temporary Order was extended until the next appearance and the hearing was adjourned pending the delivery of a decision by the Saskatchewan Court of Appeal, in an appeal by the Respondents of a decision of the Saskatchewan Financial Services Commission ("SFSC") dated February 9, 2006.

[5] On February 14, 2008 the Saskatchewan Court of Appeal released its decision, which allowed the Respondents' appeal in part, deciding that the SFSC failed to provide sufficient reasons for its sanctions decision, but took no objection to its evidentiary findings, and remitted the matter back to the SFSC for reconsideration, *Euston Capital Corp. v. Saskatchewan Financial Services Commission*, 2008 SKCA 22. The SFSC released its decision on March 27, 2008.

[6] An Amended Statement of Allegations was issued by Staff on February 20, 2009, followed by an Amended Notice of Hearing issued by the Commission on February 20, 2009 setting down the hearing for March 19, 2009.

[7] Staff and counsel for the Respondents were in attendance at this hearing on March 19, 2009. In order to allow the parties to complete their submissions, an order was made on March 20, 2009 adjourning the hearing and extending the Temporary Order until April 1, 2009.

[8] At the conclusion of this hearing on April 1, 2009, the Temporary Order was extended until the release of this decision.

## B. The Respondents

[9] Euston was incorporated in Ontario on August 21, 2001. Its registered office is located in Toronto at 1267A St. Clair Avenue West, Suite 600. Euston is neither a reporting issuer nor a registrant in Ontario and has never filed a prospectus with the Commission. Euston was previously a reporting issuer in Nova Scotia, but has been in default since June 30, 2005.

[10] Schwartz is an Ontario resident, and was the President, Secretary, and sole director of Euston. Schwartz has never been registered with the Commission.

## C. Issues

[11] Staff allege that the Respondents violated subsections 25(1)(a) and 53(1) of the Act, and seek final orders against the Respondents pursuant to section 127 of the Act.

[12] In addition to section 127 generally, Staff relies upon paragraph 4 of subsection 127(10) of the Act, which provides that the Commission may make an order under subsection 127(1) or (5) "in respect of a person or company if … [t]he person or company is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions, conditions, restrictions or requirements on the person or company".

[13] We consider whether a sanctions order should be made against the Respondents below.

[14] Staff seek the following order against the Respondents:

(a) that pursuant to subsection 127(1)2. trading in any securities by or of the Respondents cease for a period of ten years;

(b) that pursuant to subsection 127(1)2.1 the acquisition of any securities by the Respondents is prohibited for a period of ten years;

(c) that pursuant to subsection 127(1)3. any exemption contained in Ontario securities laws do not apply to the Respondents for a period of ten years;

(d) that pursuant to subsection 127(1)7. Schwartz resign any position he holds as a director of officer of an issuer; and,

(e) that pursuant to subsection 127(1)8. Schwartz is prohibited from becoming or acting as a director or officer of any issuer for a period of ten years.

## D. Evidence

[15] Staff did not conduct a full investigation in this matter, and called a limited amount of evidence during this hearing. Instead, pursuant to the Commission's public interest jurisdiction under section 127 and pursuant subsection 127(10) of the Act, Staff rely on orders made against

the Respondents by the SFSC on March 27, 2008, the Alberta Securities Commission ("ASC") on May 31, 2007, *Re Euston Capital Corp*, 2007 ABASC 338, and by the Northwest Territories Office of the Superintendent of Securities ("NTOSS") on December 16, 2005. Staff also rely on an order made by the Manitoba Securities Commission ("MSC") on January 22, 2008 against Euston, and an order made by the British Columbia Securities Commission ("BCSC") against Schwartz on July 15, 2008, *Re Schwartz*, 2008 BCSECCOM 403.

[16] Staff filed written submissions in May, 2006 and March, 2009, and provided oral submissions during the hearing. The Respondents filed written submissions in November, 2006, and March, 2009, and counsel for the Respondents provided oral submissions during the hearing.

## II. ANALYSIS

[17] Staff have not conducted a full investigation in this matter, and primarily rely on findings and orders made in other jurisdictions. Staff submit that the Commission may make a final order against the Respondents based on findings made in other jurisdictions, pursuant to section 127 of the Act generally or pursuant to the inter-jurisdictional enforcement regime contemplated by subsection 127(10) of the Act.

[18] Accordingly, Staff have not called any evidence aside from an affidavit sworn by Staff's investigation counsel in this matter, which outlines the following background information in regards to the Respondents.

[19] Euston issued a private offering memorandum for the sale of Euston shares from the treasury to accredited investors at a price of $3.00 per share on August 26, 2002. The offering memorandum was filed with the Commission in November, 2002.

[20] Euston also filed 45-501F1 forms with the Commission between October 2002 and November 2004. Euston's filings with the Commission indicate that 956,129 Euston shares were sold, resulting in proceeds of $2,868,527. According to a shareholders list dated April 19, 2006 obtained from Euston's transfer agent, Capital Transfer Agency Inc., Euston had over 500 shareholders. The majority of the shares were sold to residents of Saskatchewan, Alberta, Manitoba, Ontario, and British Columbia. Some shares were also sold to residents of the Northwest Territories, and to those residing in countries other than Canada.

[21] In particular, according to Euston's filings, 116,258 shares were sold to over 100 residents of Ontario in exchange for $384,774.

[22] Euston and Schwartz purported to rely on the accredited investor exemption in OSC Rule 45-501 and Multilateral Instrument 45-103.

### A. Proceedings in other jurisdictions

[23] There have been numerous proceedings against the Respondents in other jurisdictions, in regards to related conduct which took place during the same time period.

**Saskatchewan**

[24] The SFSC held a hearing on February 1 and 2, 2006, and heard from Schwartz, as well as six Euston investors. In proceedings before the SFSC, Schwartz and Euston admitted that between September 2003 and November 2004, Euston, through its sales representatives, sold shares to Saskatchewan residents using a telemarketing campaign based in Toronto which resulted in approximately 53 Saskatchewan investors purchasing more than 73,000 Euston shares for at total of $220,440, and that Schwartz's actions in developing and overseeing the execution of the scheme of distribution of Euston securities to investors in Saskatchewan were acts directly or indirectly in furtherance of trades of Euston securities. Schwartz also admitted that he was responsible for all activities engaged in by Euston.

[25] The SFSC released its decision on February 9, 2006, and found that Euston and Schwartz were not entitled to rely on the accredited investor exemption as claimed. The SFSC found that "at no time, during discussions over the telephone with the possible investor, did the salesman endeavor to determine whether the possible investor could meet the test to qualify as an Accredited Investor". None of the investors who testified qualified as accredited investors, and all of them stated that they were not asked by representatives of Euston if they qualified as such.

[26] The SFSC also found that "[t]he only attempt to satisfy the Accredited Investor requirement was in the Purchase Agreement which, as we hold, was submitted to the Purchaser after the fact of the purchase having been made and therefore too late to satisfy the exemption requirements".

[27] As a result of the SFSC's finding that Euston and Schwartz traded in shares of Euston without a prospectus and without being registered, and because insufficient steps were taken to allow them to rely on the accredited investor exemption, the SFSC found that they had engaged in illegal distributions.

[28] The SFSC's finding that neither the exemption from registration nor the exemption from the prospectus requirements imposed by the Saskatchewan *Securities Act*, 1988, S.S. 1988-89, c. S-42.2 were available to Euston and Schwartz, was upheld by the Saskatchewan Court of Appeal. However, the Saskatchewan Court of Appeal did find that the SFSC erred by failing to provide reasons explaining why it imposed the sanctions it did, and remitted the matter back to the SFSC.

[29] On March 27, 2008 the SFSC released a second decision providing reasons for its sanctions decision. It made the same sanctions order as in its first decision, and ordered that Euston and Schwartz cease trading in all securities for ten years, that the exemptions provide for in section 134(1)(a) of the Saskatchewan *Securities Act* do not apply to Euston and Schwartz for ten years, and that Euston and Schwartz each pay an administrative penalty of $50,000. In its February 9, 2006 decision the SFSC ordered Schwartz to pay costs in the amount of $14,622.40.

## Alberta

[30] The ASC held a hearing from May 15 to May 18, 2006, and released its decision on February 14, 2007. It found through the efforts of Schwartz and salespersons for Euston, securities in Euston were sold to 314 Alberta residents in exchange for approximately $1.4 million, purportedly in reliance on the accredited investor exemption provided for in what was then Multilateral Instrument 45-103.

[31] The ASC found that several Alberta residents did not qualify as accredited investors, and that Euston took no reasonable steps to ensure that the investors met the income or assets threshold to qualify for the exemption. Consequently the ASC found that Euston could not rely on the accredit investor exemption. Euston and Schwartz were not registered to trade securities in Alberta, and Euston had not received a receipt for a prospectus.

[32] The ASC also found that Schwartz was the guiding mind behind the distribution of Euston securities, and that he authorized the selling activities undertaken by salespersons for Euston. Finally, the ASC found that Schwartz and Euston's salespersons made prohibited representations that Euston's securities would be listed on an exchange, and that Euston and Schwartz filed untrue reports with the ASC.

[33] The ASC held a separate sanctions hearing on March 23, 2007, and released its decision on May 31, 2007. The ASC ordered that Euston cease trading in securities until it files a prospectus and receives a receipt from the ASC, and that Schwartz cease trading securities for 10 years, that none of the exemptions under the Alberta *Securities Act*, R.S.A. 2000, c. S-4, apply to him for 10 years, that he be prohibited from acting as a director or officer for 10 years, and that he pay an administrative penalty of $50,000. The ASC also ordered Euston to pay costs in the amount of $10,000, and Schwartz to pay costs in the amount of $20,000.

## Manitoba

[34] The MSC held a hearing and rendered a decision on January 8, 2008, which found the following:

> Eight witnesses who had bought shares in Euston testified. All of them were or had been involved in small businesses, many of them in small towns and rural areas of Manitoba. Generally, each had been contacted by telephone by a representative of Euston, and solicited to purchase shares in the company. Usually several calls were made to each prospective investor, sometimes by more than one representative of Euston. Evidence suggested that the callers were persuasive in promoting the company. The amount invested varied from one purchaser to another, although the price per share was a constant $3.00.
>
> …
>
> No one from Euston had explained the definition of an accredited investor, nor explained the reason for the financial requirements, nor canvassed the investors

whether they qualified under the definition. During the hearing, each witness was asked if he or she met the definition, and all denied it.

[35] The MSC also found that once the trades were completed, usually several weeks later, the investors received a Purchase Agreement and were instructed to sign it and return it to Euston. Schedule "B" of the Purchase Agreement represented that the securities were being sold pursuant to the accredited investor exemption under what was then Multilateral Instrument 45-101.

[36] In regards to Schwartz the MSC found that he "was willfully blind in not making inquiries when he should have [in regards to whether the investors qualified for the accredited investor exemption], because he wished to remain ignorant of prospective investors' true financial situation. Quite simply put, the requirements of the Instrument were not met, the exemption was unavailable and clearly the investment was not suitable for these investors".

[37] Consequently the MSC ordered that Euston is not entitled to the exemptions from registration under Manitoba's Securities Act, *The Securities Act*, R.S.M 1988, c. S50, for a period of ten years, that Euston pay an administrative penalty of $15,000 and costs of $20,325.56, and that Euston compensate five investors for a total of $48,000.

**British Columbia**

[38] The BCSC made a reciprocal order under the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, based on the ASC's decision. It ordered that Schwartz cease trading aside from trading in his name by a registered dealer, that he is prohibited from acting as a director or officer, from acting in a management or consultative capacity in connection with activities in the securities market, and that he is prohibited from engaging in investor relations activities, all for a period of ten years from the date of the ASC's decision.

**Northwest Territories**

[39] Euston and Schwartz are also subject to an order by the NTOSS, dated December 16, 2005, prohibiting them from trading in securities.

**B. Section 127 of the Act**

[40] Staff have taken the position that we have the authority to make a final order against the Respondents under our general public interest jurisdiction pursuant to section 127 of the Act. Staff have referred us to *Re Biller* (2005), 28 O.S.C.B. 10131 ("*Biller*"), *Re Woods* [1997] 8 BCSC Weekly Summary 22 ("*Woods*"), and *Re Foreign Capital Corp.* (2005), 28 OSCB 4221 ("*Foreign Capital*"), as support for their position.

[41] In *Biller* the Commission made an order permanently prohibiting the respondent from trading in securities and from acting as a director or officer of a registrant or issuer. In making its order the Commission relied primarily on the decision of the British Columbia Supreme Court,

which found that the respondent was guilty of securities-related fraud contrary to section 380(1) of the *Criminal Code* and the misappropriation of funds contrary to section 334(a) of the *Criminal Code*, though it also considered the decision of the B.C. Securities Commission. The Commission also heard evidence that following his prison sentence the respondent planned to come to Ontario and participate in the capital markets.

[42] In *Biller* at paras. 32-33 and 35-36, the panel considered the Commission's jurisdiction over the respondent, given that his illegal conduct was carried out in British Columbia and not Ontario:

> 32 A transactional nexus to Ontario is not a necessary pre-condition to the Commission's public interest jurisdiction. Rather a connection to Ontario is only one of a number of factors to be considered in the exercise of its discretion under section 127 of the Act.
>
> 33 In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commi*ssion), [2001] 2 S.C.R. 132 ("Asbestos"), the Supreme Court of Canada had to decide whether the Commission had to be satisfied that a sufficient Ontario nexus or connection to Ontario had been established as a pre-requisite to exercising its jurisdiction. At paragraph 51, the Supreme Court stated:
>
>> I agree with Laskin J.A. that "the Commission did not set up any jurisdictional preconditions to the exercise of its discretion" (p. 273). *In my view, the erection of such a jurisdictional barrier by the OSC is inconsistent with its having fought in the earlier proceedings for the recognition of its jurisdiction to hear this matter.* Furthermore, in its reasons in the present case, the OSC clearly rejected the idea that the transactional connection factor could act as a jurisdictional barrier to the exercise of its public interest discretion. At para. 63, the OSC quoted the decision of McKinlay J.A. in the earlier proceedings rejecting a transactional connection with Ontario as an implied precondition to the exercise of its s. 127 jurisdiction. The OSC then continued, at para. 64:
>>
>>> . . . we regard this statement as a refusal to impose a "sufficient Ontario connection" as a jurisdictional requirement which must be satisfied in any clause 127(1)3 proceedings before the Commission's discretion arises, thus leaving it to the Commission to make the necessary discretionary determination unencumbered by any a priori requirement imposed by the court as a matter of interpretation of the statutory provision. (Emphasis added)

…

35 **Accordingly, an Ontario connection is not a pre-condition to the exercise of the Commission's jurisdiction. It is however, a factor considered in *Asbestos* and can be considered by the Commission in this case in exercising its discretion.**

36 Biller's conduct in Eron was so egregious and the losses to investors so significant that investor confidence in the Ontario capital markets would be damaged if this panel could not consider and, if it thought to be in the public interest to do so, make an order against Biller under section 127 of the Act.

[Emphasis added]

[43] In *Foreign Capital* the Commission made a sanctions order against the Respondent after considering his past criminal conduct in a securities-related matter. The Commission stated at paragraph 26 that a "respondent's past criminal conduct may be an important indicator of the need for protective action". The Commission relied on transcripts from the respondent's criminal hearing before the Ontario Superior Court of Justice, in which the respondent was found guilty of defrauding 128 investors contrary to section 380(1)(a) and 334(a) of the *Criminal Code of Canada*.

[44] In *Woods* the B.C. Securities Commission relied on the findings of the Ontario courts that the respondent had breached the Act, by trading in securities with knowledge of a material fact or material change that had not been generally disclosed. The respondent was sentenced to imprisonment for 30 days. No other evidence was put before the panel. The B.C. Securities Commission stated the following:

> **We consider it reasonable to rely on the findings of fact made by the courts in Ontario and accordingly we adopt the foregoing findings as our own.**
>
> …
>
> Provincial securities litigation in Canada is substantially uniform in most material respects. The Commission is therefore interested in the activities of persons found to have contravened securities legislation in other jurisdictions … For these reasons, applications are made to the Commission from time to time to issue orders on a more or less reciprocal basis to those issue in other jurisdictions. Similarly, applications are made to securities regulators in other jurisdictions to issue these types of orders based on orders made by this Commission in the first instance.
>
> The orderly and credible regulation of the securities market throughout Canada, not to mention common sense, argues strongly that such applications be favourably received. **However, the Commission's responsibility in hearing such applications is no**

**different than in any other case. In each case, the Commission must consider what is in the public interest, and act accordingly.**

[emphasis added]

[45] In *Biller*, *Woods*, and *Foreign Capital* the respective panels considered the appropriate sanctions separately; the findings made by the courts served only to establish that a sanctions order should be made.

[46] Accordingly, 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.

## C. Subsection 127(10) of the Act

[47] On November 27, 2008, subsection 127(10) of the Act came into force. Staff seek to rely upon the inter-jurisdictional enforcement provisions of the Act and in particular, on subsection 127(10) of the Act which provides the following:

> **Inter-jurisdictional enforcement**
> 127. (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.
>
> 2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities.
>
> 3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities.
>
> 4. The person or company is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions, conditions, restrictions or requirements on the person or company.
> 5. The person or company has agreed with a securities regulatory authority in any jurisdiction to be made subject to sanctions, conditions, restrictions or requirements.

### Does subsection 127(10) operate retrospectively?

[48] Subsection 127(10) of the Act came into force after the various decisions and orders made by other securities regulatory authorities upon which Staff seeks to rely. Staff submits that the fact that subsection 127(10) came into force after the various orders and decisions were made, should not impair their ability to rely on subsection 127(10) in this matter. Specifically, Staff submits that the presumption against retrospectivity is not applicable to subsection 127(10) because it is procedural and not substantive in nature, and because it can only be exercised in the public interest and is not punitive in nature.

[49] In Canadian law, in addition to Charter provisions which restrict the retroactive effect of penal laws, the retrospective application of laws is limited by a presumption that laws only operate prospectively. However, there are exceptions to the presumption. If the purpose of the law is to protect the public rather than to be punitive, or if the law is procedural in nature rather than substantive, the presumption does not apply.

[50] Staff refers us to the Alberta Court of Appeal's decision in *Alberta Securities Commission v. Brost*, 2008 ABCA 326 ("*Brost*"). In *Brost* at para. 57, the Alberta Court of Appeal considered whether or not the increase in the maximum possible administrative penalty under the Alberta *Securities Act*, R.S.A. 2000, c. S-4 was retrospective:

> The Commission was correct to conclude that the presumption against retrospective application did not apply in this case because administrative penalties under the *Act* are not punitive but are instead designed to protect the public: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 at 471-3, cited in *Re Morrison Williams Investment Management Ltd.* (2000), 7 ASCS 2888. Moreover, contrary to what Brost and Alternatives suggest, it is well settled that "[e]xcept for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the *Charter*, there is no requirement of legislative prospectivity embodied in … any provision of our Constitution": *British Colubmia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 69.

[51] The British Columbia Court of Appeal considered the same issue in *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46 at para. 50 ("*Thow*"), and concluded that the presumption against the retrospective application of legislation does apply to the increased maximum possible administrative penalty under the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418.

[52] The divergence of the conclusions reached by the Alberta Court of Appeal and the British Court of Appeal hinges, in part, on their differing interpretations of the Supreme Court of Canada's decision in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 ("*Brosseau*").

[53] In *Brosseau*, the Supreme Court of Canada considered whether or not new sections in Alberta's *Securities Act*, R.S.A. 1981, c. S-6.1, which gave the Alberta Securities Commission the authority to prohibit individuals from trading in securities and to decide whether or not certain exemptions in the act apply, should attract the presumption against retrospectivity. L'Heureux-Dubé J., writing for the court, cited the following excerpt of the decision by Dickson J. (as he then was) in *Gustavson Drilling (1964) Ltd. v. The Minister of National Revenue*, [1977] 1 S.C.R. 271 at p. 279, as the general principal with respect to the retrospectivity of legislative enactments:

> The general rule is that the statutes are not to be constructed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

[54] However, the presumption against retrospectivity does not apply to all types of legislation. In *Brosseau* at paras. 50-51 and 53, L'Heureux-Dubé J., in deciding that the changes to Alberta's *Securities Act* did not attract the presumption against retrospectivity, outlined a rebuttal to the presumption where the goal of the legislation is not to punish, but rather to protect the public. I:

> The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit. As Elmer Driedger, Construction of Statutes, 2nd ed. (1983), explains at p. 198::
>
> > ... there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.
>
> A subcategory of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public. This distinction was elaborated in the early case of R. v. Vine (1875), L.R. 10 Q.B. 195 , where Cockburn C.J. wrote at pp. 199-200:
>
> > If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of

> Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes -- that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character ... the legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be kept by persons of good character; and it matters not for this purpose whether a person was convicted before or after the Act passed, one is equally bad as the other and ought not to be intrusted with a licence.

…

Elmer Dreidger summarizes the point in "Statutes: Retroactive, Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at p. 275:

> In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

[55] The Supreme Court of Canada considered the nature of section 127 in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("*Asbestos")* at para. 43:

> …Rather, the 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: Re Mithras Management Ltd. (1990), 13 O.S.C.B. 1600 (Ont. Securities Comm.)…

[56] Based on a plain reading of subsection 127(10) in the context of section 127 as a whole, and after taking into account the Supreme Court of Canada's decisions in *Brosseau* and *Asbestos*, we conclude that the purpose of purpose of subsection 127(10) is to protect the public. Hence, the presumption against retrospectivity is not applicable, and subsection 127(10) may operate retrospectively.

[57] While the courts in *Brost* and *Thow* had to consider the retrospective application of a provision which expanded the sanctioning powers of a securities regulator, subsection 127(10) of the Act does no such thing. Rather, subsection 127(10) of the Act simply 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.

[58] Moreover, this Commission has considered the conduct of individuals in other jurisdictions in the past when making an order under subsections 127(1) and (5) in the public interest, even before subsection 127(10) came into effect (see our earlier discussion of *Biller* and *Foreign Capital*).

[59] In light of our conclusion that the presumption against retrospectivity is inapplicable to subsection 127(10) of the Act, given that the purpose of the subsection is to protect the public, it is not necessary to consider whether subsection 127(10) of the Act is procedural or substantive in nature.

**D. The Necessity of Sanctions**

[60] Having determined that we can make an order against the Respondents pursuant to our public interest jurisdiction under section 127 or pursuant to subsection 127(10) of the Act, we now have to determine whether sanctions are necessary, and if so, whether the order proposed by Staff is appropriate in the circumstances.

[61] In deciding whether or not it is in the public interest that an order be made against the Respondents, we are guided by the underlying purposes of the Act, as set out in section 1.1:

> (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.

[62] In pursuing the purposes of the Act, we are also guided by the fundamental principles of the Act as enunciated by section 2.1, which include: "the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants"; that "effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission"; and that the "integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes".

[63] In making an order under section 127 of the Act, the Commission exercises its public interest jurisdiction in a protective and preventative manner. As stated in *Re Mithras Management Ltd*. (1990), 13 O.S.C.B. 1600 at pp. 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 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.

[64] In view of the various decisions and orders made by securities regulatory authorities in other jurisdictions, we considered the following factors in deciding whether or not sanctions against the Respondents are necessary in order to protect the public interest:

- Euston sold shares in exchange for nearly $2.9 million from investors across Canada, including Ontario, while purportedly relying on the accredited investor exemption;

- Schwartz admitted before the SFSC that he was responsible for the conduct of Euston;

- many of the witnesses who testified at the various hearings in other jurisdictions stated that they were not accredited investors;

- the SFSC and the ASC found that the Respondents did not take reasonable steps to ensure that the investors qualified for the accredited investor exemption;

- the SFSC, the ASC, and the MSC all found that investors received a Purchase Agreement which made representations that they were accredited investors, after the trades had already been completed;

- the ASC found that Euston filed untrue reports, and that Schwartz and Euston made prohibited representations that Euston's securities would be listed on an exchange;

- Euston and Schwartz marketed Euston's securities from an office in Ontario, and according to filings made with the Commission, sold securities to residents of Ontario;

- relying on the various decisions and orders made by securities regulatory authorities in other jurisdictions, represents a timely, open and efficient administration and enforcement of the Act by the Commission (section 2.1 of the Act);

- the terms of the orders made by the various securities regulatory authorities indicate that they viewed the Respondents conduct as a serious threat to the public interest.

[65] We also considered the following factors, which we considered to be the most important:

- if the conduct as found to have taken place in Saskatchewan, Alberta, and Manitoba had been found to have taken place in Ontario with Ontario investors, that conduct

would have been contrary to the public interest in Ontario, and would have also amounted to violations of subsection 25(1)(a) of the Act for trading in securities without registration and subsection 53(1) of the Act for distributing securities without a prospectus or receipt from the Director;

- the proposed sanctions by Staff correspond with the fundamental principles that the Commission maintain "high standards of fitness and business conduct to ensure honest and responsible conduct by market participants" and that the "integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes". (section 2.1, paragraph 2 of the Act).

[66] Counsel for the Respondents suggested that in considering decisions reached by other securities regulatory authorities, we should "take into account everything that's happened up to this point and review it as … an appeal court … but with powers beyond an appeal court because all securities regulators can review their own decisions, remake their own decisions, with raw discretion". While we agree with counsel's assertion that we are not bound by the decisions of other securities regulatory authorities, we have been given no reason to doubt the veracity of the findings made by the SFSC, the MSC, and the ASC. Furthermore, we note that the Respondents had opportunities to make submissions during those hearings, and did in fact do so; counsel for the Respondents appeared during proceedings before the SFSC and the ASC, and Euston made written submissions to the MSC.

[67] In addition, the Saskatchewan Court of Appeal reviewed the findings of the SFSC, and decided only that the SFSC was required to provide more detailed reasons for its sanctions decision and took no objection to its evidentiary findings.

[68] Counsel for the Respondents also suggested that there should have been a joint hearing amongst the various securities regulatory authorities, rather than multiple separate proceedings. Here we note only that it was the Respondents' actions which resulted in the necessity of proceedings in multiple jurisdictions. In deciding to market and sell securities in multiple jurisdictions, the Respondents must have known or should have known that they would be subject to regulation by multiple authorities.

[69] Schwartz testified during this hearing to show that there has been "no loss of value to investors". He testified that at some point Euston acquired a public shell company named AccessMed for $200,000, which was meant to be the vehicle by which Euston went public. Schwartz testified that once Euston ran into regulatory problems, he attempted to save shareholder value by gifting one share of AccessMed in exchange for each share of Euston held by shareholders. He stated that Euston gave all of its assets and business to AccessMed. Schwartz also stated that he transferred his entire interest in AccessMed of 2 million shares to Uranium 308 Resources Inc. in exchange for 15,000 Euros; the cost of listing AccessMed on the Frankfurt Stock Exchange.

[70] Schwartz testified that he was then approached by a company called Kinti Mining Group that was seeking to list on the Frankfurt Stock Exchange. He stated that Kinti Mining Group performed a reverse takeover of AccessMed to gain access to the Exchange. Schwartz testified that immediately after the reverse takeover, Kinti Mining Group was trading at the approximate value at which Euston shares were purchased.

[71] Schwartz stated the following in regards to the current situation:

> Schwartz: So, yes, today is the stock is about on the -- well, there are two markets, two venues on the Frankfurt Stock Exchange for this Kinti Mining stock. On what's called the Xetra, the X-E-T-R-A market, it's quoted at -- which is an electronic market, it's not floor trading, it's an electronic market, it's quoted at, I believe -- still quoted at two Euros, but on the -- on the floor -- on the regular floor trading market it's down to three and a half Euro cents. So it has collapsed since the gifting took place.
>
> …
>
> Schwartz: Because of the -- well, primarily, I guess, because if -- if I had to put on my handicapper hat, I would say because the market itself has plunged due to the world financial crisis. I do not know how many shareholders were able to cash out while the stock was at the two Euro, but ... I do not know that.

[72] We were shown no evidence that any investors actually cashed in their shares of AccessMed or Kinti Mining Group while it was still trading at two Euros, nor were we provided with an explanation as to why Schwartz was willing to give Uranium 308 Resources Inc. 2 million shares of AccessMed which were ostensibly worth 4 million Euros in exchange for 15,000 Euros. It appears to us that contrary to Schwartz's assertion, over 500 investors have experienced at least a significant loss of their investment, and possibly even a loss of their entire investment of nearly $2.9 million.

[73] As a result of the fact that we were presented with only limited evidence, and heard from no investors resident in Ontario, we are not able to come to the conclusion that the Respondents violated subsections 25(1)(a) or 53(1) of the Act.

[74] However, in light of the reasons listed above, we find that sanctions against the Respondents are necessary in order to protect the public interest.

**E. The Appropriate Sanctions**

[75] In determining the nature and duration of the appropriate sanctions, the Commission may consider a number of factors including:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

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

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

(e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered but any like-minded people from engaging in similar abuses of the capital markets; and

(f) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, at paras. 25-26)

[76] Further, the Supreme Court of Canada in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 has affirmed that the Commission may properly impose sanctions which are a general deterrent, stating "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

[77] While we are mindful that in determining the appropriate sanctions in this matter, we must consider the specific circumstances to ensure that the sanctions are proportionate to the conduct involved (see *Re M.C.J.C. Holdings Inc. and Michael Cowpland*, (2002), 25 O.S.C.B. 1133 ("*Re M.C.J.C. Holdings*") at para. 26).

[78] Staff decided to rely on subsection 127(10) of the Act in this matter, and thus presented us with only limited evidence. The limited evidence before us indicates that the Respondents may have been engaged in serious misconduct in Ontario, and their conduct may have harmed a number of Ontario investors. A more thorough presentation of the evidence in regards to the Respondents' conduct in Ontario may have led to more serious sanctions against the Respondents.

[79] Nevertheless, we find that Staff's proposed sanctions further the goals of the Act, and reflect a fair and proportionate outcome relative to the Respondents' known conduct.

## III. CONCLUSION

[80] For the aforementioned reasons, we find that it is in the public interest to impose the sanctions against the Respondents recommended by Staff, which we note are similar to those imposed by the SFSC, the ASC, the MSC, and the BCSC.

[81] Pursuant to our public interest jurisdiction under section 127 and pursuant to subsection 127(10) of the Act, we have decided to order:

- that trading in securities by or of the Respondents shall cease for a period of ten years from the date of the order;

- that the Respondents be prohibited from acquiring any securities for a period of ten years from the date of the order;

- that any exemptions contained in Ontario securities laws shall not apply to the Respondents for a period of ten years from the date of the order;

- that Schwartz resign any positions he holds as a director or officer of an issuer; and

- that Schwartz be prohibited from becoming a director or officer of any issuer for a period of ten years from the date of the order.

Accordingly, we have issued our order dated July 29, 2009.

Dated at Toronto this 29th day of July, 2009

| "Wendell S. Wigle" | "Suresh Thakrar" |
| --- | --- |
| Wendell S. Wigle, Q.C. | Suresh Thakrar |