



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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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 FREDERICK JOHNATHON NIELSEN, previously known as
FREDERICK JOHN GILLILAND**

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

Decision: March 27, 2013

Panel: James E. A. Turner - Vice-Chair

Counsel: Sylvia Schumacher - For Staff of the Commission

TABLE OF CONTENTS

I. OVERVIEW	1
II. FINDINGS OF THE BRITISH COLUMBIA SECURITIES COMMISSION	2
III. ANALYSIS	3
A. SUBSECTION 127(10) OF THE ACT.....	3
B. SUBMISSIONS OF THE PARTIES	4
C. FINDINGS	5
D. SHOULD AN ORDER FOR SANCTIONS BE IMPOSED?	5
E. THE APPROPRIATE SANCTIONS	6
IV. CONCLUSION	8

Schedule “A” – Form of Order

REASONS FOR DECISION ON SANCTIONS

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 sanctions against Frederick Johnathon Nielsen, previously known as Frederick John Gilliland (“**Nielsen**”).

[2] A Notice of Hearing in this matter was issued by the Commission on November 23, 2012 and a Statement of Allegations was filed by Staff of the Commission (“**Staff**”) on November 22, 2012.

[3] On December 14, 2012, 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. Nielsen did not appear at the application hearing.

[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. Nielsen did not appear and did not file any responding materials.

[6] On March 25, 2011, the British Columbia Securities Commission (the “**BCSC**”) issued an order (the “**BC Order**”) approving a settlement agreement dated March 25, 2011 (the “**Settlement Agreement**”) between Nielsen and the BCSC. The BC Order imposed sanctions on Nielsen. In the Settlement Agreement, Nielsen consented to any securities regulator in Canada relying on the facts admitted in the Settlement Agreement for the purpose of making a similar order.

[7] The conduct for which Nielsen was sanctioned occurred between late March 2009 and early May 2009.

[8] Staff relies on subsection 127(10) of the Act, which permits the Commission to make an order under subsections 127(1) or 127(5) of the Act in respect of a person or company who 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 (subsection 127(10)4) of the Act).

[9] These are my reasons for sanctions imposed pursuant to subsections 127(1) of the Act in reliance on subsection 127(10) of the Act.

II. FINDINGS OF THE BRITISH COLUMBIA SECURITIES COMMISSION

Misconduct: Cold Calling and Trading Without Registration

[10] In the Settlement Agreement, Nielsen admitted the following:

- (a) Nielsen has never been registered with the BCSC in any capacity;
- (b) between late March and early May 2009, Nielsen organized and operated a “telephone room” in Surrey, British Columbia, for the purpose of marketing and selling shares in Green Farms International Inc. (“**Green Farms**”), a private U.S. company;
- (c) during that time, Nielsen hired, supervised and instructed four salespeople who placed hundreds of phone calls per day to U.S. residents in an attempt to sell shares in Green Farms;
- (d) as a direct result of the calls, two U.S. residents invested a total of \$4,500 in shares of Green Farms;
- (e) Nielsen convinced another U.S. resident by other means to invest \$10,000 in shares of Green Farms;
- (f) by engaging in the conduct described above, Nielsen:
 - (i) contravened section 49 of the *Securities Act*, RSBC 1996, c. 418 (the “**BC Act**”) by having salespeople telephone residences on his behalf from within British Columbia for the purpose of trading in securities; and
 - (ii) contravened section 34 of the BC Act by engaging in acts in furtherance of a trade in securities without being registered.

Aggravating Factors: Past Securities Misconduct and Sanctions

[11] In the Settlement Agreement, Nielsen admitted the following aggravating factors:

- (a) while residing in Florida in the late 1990s, Nielsen, then known as Frederick John Gilliland (“**Gilliland**”), was involved in a Ponzi scheme (the “**Ponzi Scheme**”) carried out throughout the United States, Canada and the United Kingdom, fraudulently soliciting more than \$20 million from over 200 investors;
- (b) In March, 2002, the United States Securities and Exchange Commission (the “**SEC**”) filed a civil complaint against Gilliland in relation to the Ponzi Scheme. The SEC was granted final judgment against Gilliland in October, 2004 for \$10,141,179;
- (c) In June, 2005, Gilliland pleaded guilty to conspiracy to commit wire fraud and securities fraud, and conspiracy to commit money laundering, in relation to the

Ponzi Scheme. In October, 2005, he was sentenced to 60 months in prison and ordered to pay over \$12 million in restitution;

- (d) a receiver was appointed to recover assets from Gilliland's estate to satisfy the civil and criminal monetary orders. The receiver was able to seize and recover just over \$3.6 million; and
- (e) Gilliland was released from prison in October, 2008, moved to British Columbia, and changed his name to Nielsen.

The BC Order

[12] The BC Order imposed the following sanctions on Nielsen:

- (a) pursuant to section 161(l)(b) of the BC Act, Nielsen is to cease trading or purchasing securities or exchange contracts for 25 years from the date of the BC Order, except that he may trade and purchase securities and exchange contracts through a registrant in one cash and one RSP account if he first provides a copy of the BC Order to the registrant;
- (b) pursuant to section 161(l)(d)(i) of the BC Act, Nielsen is to resign any position that he holds as a director or officer of any issuer;
- (c) pursuant to section 161(l)(d)(ii) of the BC Act, Nielsen is prohibited from acting as a director or officer of any issuer for 25 years from the date of the BC Order;
- (d) pursuant to section 161(l)(d)(iii) of the BC Act, Nielsen is prohibited from becoming or acting as a registrant, investment fund manager or promoter for 25 years from the date of the BC Order;
- (e) pursuant to section 161(1)(d)(iv) of the BC Act, Nielsen is prohibited from acting in a management or consultative capacity in connection with activities in the securities market for 25 years from the date of the BC Order; and
- (f) pursuant to section 161(l)(d)(v) of the BC Act, Nielsen is prohibited from engaging in investor relations activities for 25 years from the date of the BC Order.

III. ANALYSIS

A. SUBSECTION 127(10) OF THE ACT

[13] 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:

...

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.

[14] The BC Order makes Nielsen subject to an order of the BCSC that imposes sanctions, conditions, restrictions or requirements on him, within the meaning of paragraph 4 of subsection 127(10) of the Act. Further, Nielsen has agreed in the Settlement Agreement to be made subject to sanctions, conditions, restrictions and requirements, within the meaning of paragraph 5 of subsection 127(10) of the Act.

[15] Based on the finding in paragraph 14 of these reasons, 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.

[16] In *Re Euston Capital Corp.* (2009), 32 OSCB 6313 (“*Euston Capital*”), the Commission concluded that subsection 127(10) can be the grounds for an order in the public interest under subsection 127(1) of the Act, based on a decision and order made in another jurisdiction:

... 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. 26)

[17] I therefore find that I have the authority to make a public interest order under subsection 127(1) of the Act in reliance on subsection 127(10) of the Act, based on the BC Order and the facts and circumstances set out in the Settlement Agreement.

B. SUBMISSIONS OF THE PARTIES

Staff’s Submissions

[18] Staff requests the following sanctions against Nielsen:

- (a) pursuant to paragraph 2 of subsection 127(1) of the Act, that trading in any securities by Nielsen cease until March 25, 2036;

- (b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by Nielsen be prohibited until March 25, 2036;
- (c) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to Nielsen until March 25, 2036;
- (d) pursuant to paragraph 7 of subsection 127(1) of the Act, that Nielsen resign any positions that he holds as a director or officer of any issuer as of the date of the order;
- (e) pursuant to paragraph 8 of subsection 127(1) of the Act, that Nielsen be prohibited from becoming or acting as a director or officer of any issuer until March 25, 2036; and
- (f) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Nielsen be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter until March 25, 2036.

[19] Staff submits that I am entitled to impose the sanctions requested by Staff based solely on the evidence before me, which consists of the BC Order and the Settlement Agreement.

Respondent's Submissions

[20] The Respondent did not appear and did not make any submissions.

C. FINDINGS

[21] In imposing sanctions, I rely on the BC Order and the facts and circumstances set out in the Settlement Agreement. It is not appropriate in exercising my jurisdiction to revisit or second-guess the BCSC's findings of fact or legal conclusions.

D. SHOULD AN ORDER FOR SANCTIONS BE IMPOSED?

[22] 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.

[23] 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 are restrictions on fraudulent and unfair market practices and procedures.

[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] 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).

[26] I find that it is necessary to protect Ontario investors and the integrity of Ontario’s capital markets to make a sanctions order against the Respondent in the public interest.

E. THE APPROPRIATE SANCTIONS

[27] In determining the nature and duration of the appropriate sanctions, I must consider all of the relevant facts and circumstances before me, including:

- (a) the seriousness of the conduct and the breaches of the BC Act;
- (b) the harm to investors;
- (c) the level of a respondent’s activity in the marketplace;
- (d) whether or not the sanctions imposed may serve to deter not only the Respondent but any like-minded people from engaging in similar abuses of the Ontario capital markets;
- (e) the effect any sanctions may have on the ability of the Respondent to participate without check in the capital markets; and
- (f) any mitigating factors.

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

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

- (a) Nielsen admitted that his conduct contravened sections 34 and 49 the BC Act;

- (b) Nielsen admitted to the aggravating factors set out in paragraph 11 of these reasons;
- (c) the conduct for which Nielsen was sanctioned in the BC Order would have constituted contraventions of Ontario securities laws if they had occurred in Ontario, including a contravention of subsection 25(1) of the Act;
- (d) the sanctions imposed by me under the proposed order are consistent with the sanctions imposed in the BC Order; and
- (e) Nielsen consented in the Settlement Agreement to any securities regulator in Canada relying on the facts admitted in that agreement for the purpose of making a similar order.

[29] In my view, there are no mitigating factors or circumstances in this matter.

[30] I have reviewed the Commission and other decisions on sanctions referred to me by Staff in assessing the sanctions 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).

[31] 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 BCSC has a duty to provide reasons, however brief, for the sanctions it was imposing and why they were in the public interest. “[M]erely reciprocally enforcing] the Ontario order ... would not be consistent with it's mandate under s. 161 [section 127 of the Act], and ... might amount to a fettering of discretion” (*McLean, supra*, at paras. 28-29).

[32] In *Lines v. British Columbia (Securities Commission)*, (2012) BCCA 316 (“*Lines*”), the British Columbia Court of Appeal interpreted *McLean, supra*, 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).

[33] Staff submits that the sanctions imposed in the BC Order are appropriate to the misconduct admitted to by Nielsen, and serve as both specific and general deterrence. Staff further submits that a protective order imposing market conduct restrictions on Nielsen’s participation in Ontario capital markets consistent with those imposed by the BC Order, are required to protect Ontario investors and Ontario's capital markets from similar misconduct by Nielsen.

[34] It should be noted that under the BC Order, Nielsen is permitted to “trade and purchase securities and exchange contracts through a registrant in one cash and one RSP account if he first provides a copy of the Order to the registrant” (the “**Carve out**”). I am prepared to impose sanctions subject to the Carve out in order to mirror the BC Order.

[35] 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 sanctions on Nielsen:

- (a) trading in securities by Nielsen shall cease until March 25, 2036, except that Nielsen may trade and purchase securities and exchange contracts through a registrant in one cash and one RSP account if he first provides to the registrant a copy of the BC Order and the Order attached as Schedule A to these Reasons;
- (b) the acquisition of any securities by Nielsen shall be prohibited until March 25, 2036, except that Nielsen may trade and purchase securities and exchange contracts through a registrant in one cash and one RSP account if he first provides to the registrant a copy of the BC Order and the Order attached as Schedule A to these reasons;
- (c) any exemptions in Ontario securities law shall not apply to Nielsen until March 25, 2036;
- (d) Nielsen shall resign any positions he holds as a director or officer of any issuer;
- (e) Nielsen shall be prohibited from becoming or acting as a director or officer of any issuer until March 25, 2036; and
- (f) Nielsen shall be prohibited from becoming or acting as a registrant, an investment fund manager or a promoter until March 25, 2036.

IV. CONCLUSION

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

DATED at Toronto this 27th day of March, 2013.

"James E. A. Turner"

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 FREDERICK JOHNATHON NIELSEN, previously known as FREDERICK JOHN GILLILAND

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

WHEREAS on November 23, 2012, 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 Frederick Johnathon Nielsen, previously known as Frederick John Gilliland ("Nielsen");

AND WHEREAS on November 22, 2012, Staff of the Commission ("Staff") filed a Statement of Allegations in this matter;

AND WHEREAS Nielsen entered into a settlement agreement with the British Columbia Securities Commission dated March 25, 2011 ("Settlement Agreement");

AND WHEREAS in the Settlement Agreement, Nielsen consented to any securities regulator in Canada relying on the facts admitted in the Settlement Agreement for the purpose of making a similar order;

AND WHEREAS the Respondent is subject to an order dated March 25, 2011 made by the British Columbia Securities Commission, that imposes sanctions, conditions, restrictions or requirements upon him within the meaning of paragraph 4 of subsection 127(10) of the Act (the "BC Order");

AND WHEREAS on December 14, 2012, the Commission heard an application by Staff 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 the Commission granted Staff's application to proceed by written hearing and established a schedule for the submission of materials by the parties;

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

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

AND WHEREAS 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 securities by Nielsen shall cease until March 25, 2036, except that Nielsen may trade and purchase securities and exchange contracts through a registrant in one cash and one RSP account if Nielsen first provides to the registrant a copy of the BC Order and this Order;
- (b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Nielsen is prohibited until March 25, 2036, except that Nielsen may trade and purchase securities and exchange contracts through a registrant in one cash and one RSP account if he first provides to the registrant a copy of the BC Order and this Order;
- (c) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to Nielsen until March 25, 2036;
- (d) pursuant to paragraph 7 of subsection 127(1) of the Act, Nielsen shall resign any positions that he holds as a director or officer of any issuer;
- (e) pursuant to paragraph 8 of subsection 127(1) of the Act, Nielsen is prohibited from becoming or acting as a director or officer of any issuer until March 25, 2036; and
- (f) pursuant to paragraph 8.5 of subsection 127(1) of the Act, Nielsen is prohibited from becoming or acting as a registrant, an investment fund manager or a promoter until March 25, 2036.

DATED at Toronto this 27th day of March, 2013.

"James E. A. Turner"

James E. A. Turner