



Ontario
Securities
Commission

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de l'Ontario

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Citation: Michaels (Re), 2019 ONSEC 22
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File No. 2019-20

**IN THE MATTER OF
DAVID MICHAEL MICHAELS**

**REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: In Writing

Decision: June 25, 2019

Panel: Lawrence P. Haber Commissioner

Submissions: Kai Olson For Staff of the Commission

No hearing brief or written
submissions were filed by or on
behalf of David Michael Michaels

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REASONS AND DECISION

I. INTRODUCTION

- [1] Staff of the Ontario Securities Commission (**Staff** of the **Commission**) requests that an order under s. 127(1) of the *Securities Act*¹ be made against David Michael Michaels (the **Respondent** or **Michaels**) pursuant to the inter-jurisdictional enforcement provisions in s. 127(10) of the Act.
- [2] In a decision issued by the British Columbia Securities Commission (the **BCSC**) on August 6, 2014,² the BCSC held that the Respondent engaged in unregistered advising, made misrepresentations and perpetrated a fraud contrary to ss. 34(b), 50(1)(d) and 57(b) of the British Columbia *Securities Act*.³
- [3] On October 31, 2014, the BCSC ordered sanctions against the Respondent, including a \$17.5 million administrative penalty, disgorgement of \$5.8 million and permanent prohibitions from participating in the securities market and acting as a director or officer.⁴
- [4] On November 28, 2014, Michaels sought leave to appeal the BCSC Findings and the BCSC Sanctions Order. On April 13, 2015, the British Columbia Court of Appeal (**BCCA**) granted Michaels leave to appeal the BCSC's findings that he made misrepresentations and perpetrated a fraud, as well as the BCSC Sanctions Order. The BCCA did not grant leave to appeal the finding of unregistered advising.⁵
- [5] On April 1, 2016, the BCCA issued Reasons for Judgement dismissing the Respondent's appeal.⁶

II. SERVICE AND PARTICIPATION

- [6] On May 15, 2019, the Commission issued a Notice of Hearing naming Michaels as a respondent in relation to a Statement of Allegations dated May 14, 2019. The Notice of Hearing states that this proceeding shall be heard in writing and that Michaels has 21 days from the date of service to file a request for an oral hearing, and 28 days from the date of service to file a hearing brief and written submissions, in accordance with Rule 11(3) of the *Ontario Securities Commission Rules of Procedure and Forms*.⁷
- [7] The Respondent was served with the Notice of Hearing, Statement of Allegations and Staff's written submissions, hearing brief and brief of authorities. No request for an oral hearing was made and no materials were filed by the Respondent. The Commission may proceed in the absence of a party where that party has been given notice of the hearing.⁸

¹ RSO 1990, c S.5 (the **Act**).

² *Michaels (Re)*, 2014 BCSECCOM 327 (the **BCSC Findings**).

³ RSBC 1996, c 418 (the **BC Act**); BCSC Findings at para 253.

⁴ *Michaels (Re)*, 2014 BCSECCOM 457 (the **BCSC Sanctions Order**) at para 53.

⁵ *Michaels v British Columbia Securities Commission*, Oral Reasons for Judgment dated April 13, 2015, Hearing Brief of Staff dated May 14, 2019. Staff's Hearing Brief is marked as Exhibit 1.

⁶ *Michaels v British Columbia Securities Commission*, 2016 BCCA 144 at paras 128-129.

⁷ (2017), 40 OSCB 8988, r 11(3)(e)-(g) (the **Rules of Procedure**).

⁸ *Statutory Powers Procedure Act*, RSO 1990 c S.22, s 7(2); Rules of Procedure, r 21(3).

III. THE BCSC FINDINGS

A. Background

- [8] Michaels is a resident of British Columbia. He was registered under the BC Act as a mutual fund salesperson from 1996 to 2006, but was not registered from June 2007 to December 2010 (the **Material Time**).⁹
- [9] The Respondent's business was the sale of exempt market securities, life insurance policies, and insurance-based investment products to retail investors. During the Material Time, Michaels sold \$65 million of exempt market securities to 484 investors through a company he controlled. He received \$5.8 million in commissions on these sales.¹⁰
- [10] Michaels promoted his business aggressively through a weekly radio program, investment seminars, brochures, a website and at meetings at his offices in Victoria and Vancouver.¹¹
- [11] The Respondent's target demographic was seniors; the average age of his clients was 72.¹² Michaels told his clients to sell their existing portfolios, buy exempt market securities, and to borrow against their homes to do so, without advising his clients about the risks associated with exempt market securities. He steered clients away from traditional investments by telling them such investments produced only losses or poor returns, and that the advisers who sold them could not be trusted.¹³ In some cases, Michaels described investments he offered as opportunities for his clients to, among other things, earn income without stock market risk or to double retirement savings every six years.¹⁴
- [12] Michaels also offered a "second opinion" process to help clients decide whether to invest with him. Michaels reviewed their current tax returns and investment statements and used the information in them to demonstrate how inferior his clients' existing investments were to what he was offering.¹⁵

B. BCSC Findings

- [13] The BCSC panel held that Michaels engaged in unregistered advising, made misrepresentations and perpetrated a fraud contrary to ss. 34(b), 50(1)(d) and 57(b) of the BC Act.¹⁶
- [14] The panel described the Respondent's conduct as a textbook example of improper sales practices that violated the principle of investor protection and seriously damaged confidence in both traditional and exempt markets. Michaels preyed on clients by misleading them into leaving the comparative safety of traditional capital markets for the far riskier part of the exempt market. The panel also found that approximately \$40 million of the original \$65 million invested by Michaels' clients was worthless as at the time of the BCSC proceedings.¹⁷

⁹ BCSC Findings at paras 3 and 16-18.

¹⁰ BCSC Findings at paras 15 and 31.

¹¹ BCSC Findings at paras 20-27 and 78.

¹² BCSC Findings at paras 28-29.

¹³ BCSC Findings at paras 78 and 166.

¹⁴ BCSC Findings at paras 175-178.

¹⁵ BCSC Findings at para 79.

¹⁶ BCSC Findings at para 253.

¹⁷ BCSC Findings at paras 247-249 and 256.

C. BCSC Sanctions Order

- [15] The BCSC Sanctions Order imposed the following sanctions, conditions, restrictions or requirements upon the Respondent pursuant to the BC Act:
- (a) pursuant to s. 161(1)(b)(ii), Michaels cease trading in, and is permanently prohibited from purchasing securities, except Michaels may trade or purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;
 - (b) pursuant to s. 161(1)(c), all exemptions set out in the Act do not apply to Michaels permanently, except for those exemptions necessary to enable Michaels to trade or purchase securities in his own account;
 - (c) pursuant to s. 161(1)(d)(i), Michaels resign any position he holds as a director or officer of an issuer or registrant;
 - (d) pursuant to s. 161(1)(d)(ii), Michaels is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant;
 - (e) pursuant to s. 161(1)(d)(iii), Michaels is permanently prohibited from becoming or acting as a registrant or promoter;
 - (f) pursuant to s. 161(1)(d)(iv), Michaels is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
 - (g) pursuant to s. 161(1)(d)(v), Michaels is permanently prohibited from engaging in investor relations activities;
 - (h) pursuant to s. 161(1)(g), Michaels pay to the BCSC \$5.8 million; and
 - (i) pursuant to s. 162, Michaels pay to the BCSC an administrative penalty of \$17.5 million.¹⁸

IV. ANALYSIS AND DECISION

[16] Staff seeks an order imposing sanctions that substantially mirror those in the BCSC Sanctions Order.

[17] The issues for this Panel to consider are:

- (a) whether one or more of the circumstances under s. 127(10) of the Act apply to the Respondent; and
- (b) if so, whether the Commission should exercise its public interest jurisdiction to make an order pursuant to s. 127(1) of the Act.

A. Subsection 127(10) of the Act

[18] Subsection 127(10) of the Act does not itself empower the Commission to make an order; rather, it provides a basis for an order under s. 127(1). This provision facilitates cross-jurisdictional enforcement by allowing the Commission to issue protective, preventive and prospective orders to ensure that misconduct that has taken place in another jurisdiction will not be repeated in Ontario's capital markets.

¹⁸ BCSC Sanctions Order at para 53.

[19] In exercising its jurisdiction to make an order in reliance on s. 127(10) of the Act, the Commission does not require that the underlying conduct have a connection to Ontario.¹⁹

B. Subsection 127(1) of the Act

[20] Subsection 127(1) empowers the Commission to make orders where it is in the public interest to do so. The Commission is not required to make an order similar to that made by the originating jurisdiction. Rather, the Panel must first satisfy itself that an order for sanctions is necessary to protect the public interest in Ontario and then consider what the appropriate sanctions should be.

[21] Orders made under s. 127(1) of the Act are “protective and preventive” and are made to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets.²⁰

[22] The Commission must make its own determination of what is in the public interest. It is also important that the Commission be aware of and responsive to an interconnected, inter-provincial securities industry. The threshold for reciprocity is low.²¹ A low threshold is supported by the principle found in s. 2.1 of the Act, which provides that “[t]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.”

[23] In determining the nature and scope of sanctions to be ordered, the Commission can consider a number of factors, including the seriousness of the conduct, specific and general deterrence, and any mitigating factors.²²

[24] Fraud, misrepresentation and unregistered advising are inherently serious forms of misconduct. The Respondent’s misconduct was especially serious and harmful both to investors and to the reputation and integrity of the securities markets.²³

[25] The BCSC described the Respondent’s business model as “astonishingly predatory”. Michaels focused his marketing efforts on seniors, including individuals with little or no investing experience or who were frightened for their retirement portfolios after the 2008 financial crisis.²⁴

[26] The Respondent’s misconduct resulted in massive harm to investors. The BCSC heard testimony from clients whose financial futures had been ruined. The panel characterized the losses experienced by the Respondent’s clients as “catastrophic” and a “grievous deprivation”. At the time of the BCSC proceedings, investors had lost \$40 million of the \$65 million invested, while Michaels was personally enriched by \$5.8 million.²⁵

¹⁹ *Cho (Re)*, 2014 ONSEC 20, (2014) 37 OSCB 7285 at para 48.

²⁰ *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43.

²¹ *JV Raleigh Superior Holdings Inc (Re)*, 2013 ONSEC 18, (2013) 36 OSCB 4639 at para 21.

²² *Belteco Holdings Inc (Re)*, (1998) 21 OSCB 7743 at 7746; *MCJC Holdings Inc (Re)*, (2002) 25 OSCB 1133 at 1136.

²³ BCSC Findings at para 256; BCSC Sanctions Order at para 17.

²⁴ BCSC Sanctions Order at para 12.

²⁵ BCSC Findings at para 251; BCSC Sanctions Order at paras 14, 17, 21 and 51.

- [27] The BCSC found no mitigating factors. Instead, the panel found aggravating factors, including the predatory nature of the Respondent's business, the ongoing loan repayments burdening his clients and his significant disciplinary history.²⁶
- [28] The Respondent's deliberate attempts to avoid regulatory oversight and callous disregard for a regulatory scheme designed to protect investors from making unsuitable investments highlight the need for deterrence in this case.²⁷
- [29] I agree with the conclusion of the BCSC that protection of the public is of paramount importance and that the misconduct here was so serious that Michaels must be kept out of securities markets permanently.²⁸ The same considerations apply to Ontario markets and investors. The permanent prohibitions requested by Staff will serve as a deterrent to Michaels and send a message that fraudulent conduct and investor harm will not be tolerated.

V. CONCLUSION

- [30] For the reasons set out above, I find that it is in the public interest to impose the sanctions requested by Staff, which effectively mirror the relevant provisions of the BCSC Sanctions Order. I will therefore order that:
- a. pursuant to paragraph 2 of s. 127(1) of the Act, trading in any securities by Michaels cease permanently, except that he may trade securities for his own account through a registrant, if he gives the registrant copies of the BCSC Sanctions Order and the order of the Commission in this proceeding;
 - b. pursuant to paragraph 2.1 of s. 127(1) of the Act, the acquisition of any securities by Michaels cease permanently, except he may purchase securities for his own account through a registrant, if he gives the registrant copies of the BCSC Sanctions Order and the order of the Commission in this proceeding;
 - c. pursuant to paragraph 3 of s. 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Michaels permanently, except for those exemptions necessary to enable him to trade or purchase securities in his own account;
 - d. pursuant to paragraphs 7 and 8.1 of s. 127(1) of the Act, Michaels resign any positions that he holds as a director or officer of any issuer or registrant;
 - e. pursuant to paragraphs 8 and 8.2 of s. 127(1) of the Act, Michaels be prohibited permanently from becoming or acting as a director or officer of any issuer or registrant; and
 - f. pursuant to paragraph 8.5 of s. 127(1) of the Act, Michaels be prohibited permanently from becoming or acting as a registrant or promoter.

²⁶ BCSC Sanctions Order at paras 22-26.

²⁷ BCSC Sanctions Order at paras 28-31.

²⁸ BCSC Sanctions Order at para 32.

Dated at Toronto this 25th day of June, 2019.

"Lawrence P. Haber"

Lawrence P. Haber