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Commission

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File No. 2019-26

**IN THE MATTER OF  
JEAN-SMAILLE GERMEIL and FPE TRADING**

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

**Hearing:** In Writing

**Decision:** October 17, 2019

**Panel:** Raymond Kindiak Commissioner

**Submissions:** Vivian Lee For Staff of the Commission

No submissions made by or on behalf of Jean-Smaille Germeil and  
FPE Trading

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## REASONS AND DECISION

### I. INTRODUCTION

- [1] On March 27, 2019, a hearing panel of the Nova Scotia Securities Commission (the **NSSC**) found that Jean-Smaïlle Germeil (**Germeil**) and FPE Trading (**FPE**) (together, the **Respondents**) acted as a dealer without registration and without any available exemption from doing so, engaged in an illegal distribution of securities, engaged in unfair practices, and made untrue and misleading statements contrary to ss. 31(1), 58(1), 44A(2) and 50(2) of the Nova Scotia *Securities Act* (the **NS Act**)<sup>1</sup>, respectively.<sup>2</sup> The NSSC further found that the Respondents' conduct was contrary to the public interest and harmful to the integrity of the Nova Scotia capital markets.<sup>3</sup>
- [2] Following the findings of misconduct, the NSSC held a sanctions hearing and on May 27, 2019 issued reasons<sup>4</sup> and an order (the **NSSC Order**)<sup>5</sup> imposing sanctions on the Respondents.
- [3] Staff of the Ontario Securities Commission (**Staff** of the **Commission**) relies on the inter-jurisdictional enforcement provisions found in s. 127(10) of the Ontario *Securities Act* (the **Act**)<sup>6</sup> and requests that a protective order be issued in the public interest under s. 127(1) of the Act that imposes terms similar to the non-monetary sanctions imposed by the NSSC to the extent possible under the Act.
- [4] For the reasons that follow, I find that it is in the public interest to issue an order substantially in the form requested by Staff.

### II. SERVICE AND PARTICIPATION

- [5] Staff provided an Affidavit of Service of Lee Crann, sworn July 22, 2019 (the **Affidavit**),<sup>7</sup> which set out that Staff attempted to serve the Respondents by courier at two different street addresses, one in Quebec and one in Nova Scotia. With respect to the Nova Scotia address, the current resident of that address informed Staff that Germeil no longer resided there. With respect to the Quebec address, the Affidavit appended the FedEx tracking document; however, this document did not indicate who signed for the package.
- [6] To ascertain whether Staff took all reasonable steps to effect service pursuant to the Ontario Securities Commission *Rules of Procedure and Forms* (the **Rules**)<sup>8</sup>, I asked Staff by email dated July 31, 2019, to provide further written submissions on the issue of service by August 6, 2019.
- [7] In its email response dated August 1, 2019, Staff confirmed that the Quebec address was the last known address of the Respondents. Staff received this

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<sup>1</sup> RSNS 1989, c 418

<sup>2</sup> *Re Germeil* [Merits Decision], (27 March 2019), online: Nova Scotia Securities Commission <<https://nssc.novascotia.ca>> (**NSSC Merits Decision**) at para 89

<sup>3</sup> NSSC Merits Decision at para 89

<sup>4</sup> *Re Germeil* [Sanctions Decision], (27 May 2019), online: Nova Scotia Securities Commission <<https://nssc.novascotia.ca>> (**NSSC Sanctions Decision**)

<sup>5</sup> *Re Germeil* [Sanctions Order], (27 May 2019), online: Nova Scotia Securities Commission <<https://nssc.novascotia.ca>> (**NSSC Order**)

<sup>6</sup> RSO 1990, c S.5

<sup>7</sup> Marked as Exhibit 1 in this proceeding.

<sup>8</sup> (2019) 42 OSCB 6528

information about the Quebec address from NSSC Staff. In addition, NSSC Staff advised Staff that the email address they had on record for the Respondents was no longer in use. Consequently, Staff was unable to serve the Respondents by email. Further, Staff explained that while it is possible to conduct a driver's license search to verify an address, such searches are subject to limitations and the facts in this matter did not permit Staff to conduct a driver's license search.

- [8] As a result, Staff served the Respondent, pursuant to Rule 6(2)(d) of the Rules, by courier to the Respondents' last known address. I find that Staff complied with Rule 6(2)(d) and that the Respondents were provided with adequate notice of this proceeding. Pursuant to Rule 6(3)(e), service was effected on July 19, 2019. The Commission may proceed in the absence of a party where that party has been given notice of the hearing.<sup>9</sup>
- [9] Pursuant to Rule 11(3) of the Rules, the deadline for the Respondents to serve and file written submissions was August 16, 2019. Neither Respondent filed any materials.
- [10] By email on August 19, 2019, I asked Staff for additional written submissions explaining why a cease trade order relating to derivatives would be in the public interest in Ontario. Staff provided its response on August 26, 2019. Staff also provided a letter dated September 9, 2019, containing submissions and an Affidavit of Attempted Service of Lee Crann, sworn September 5, 2019,<sup>10</sup> setting out the steps Staff took to attempt to serve the Respondents with its additional written submissions. In that affidavit, Staff confirmed that:
- a. on August 26, 2019, Staff attempted to serve the additional written submissions on the Respondents at the Quebec address;
  - b. on August 27, 2019, Staff contacted Staff at Quebec's Autorité des Marchés Financiers (**AMF**) to request assistance in locating an alternative address in Quebec for the Respondents;
  - c. on August 28, 2019, AMF Staff confirmed that the Quebec address they were using is currently owned by individuals with the same last name as Germeil and AMF Staff did not provide any other alternative addresses; and
  - d. on September 5, 2019, NSSC Staff informed Staff that the Quebec address was the only address NSSC Staff knew of and that NSSC Staff were not aware of any active phone numbers for the Respondents.
- [11] In my view, Staff has taken all reasonable steps to attempt to locate and serve the Respondents with materials in this proceeding. I find that Staff complied with Rule 6(2)(d) of the Rules by sending the materials to the Respondents' last known address.

### **III. THE NSSC DECISIONS**

#### **A. NSSC Findings**

- [12] Between June 2013 and January 2015 (the **Material Time**)<sup>11</sup> the Respondents

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<sup>9</sup> *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 7(2); *Rules*, r 21(3)

<sup>10</sup> Marked as Exhibit 2 in this proceeding.

<sup>11</sup> NSSC Merits Decision at para 3

raised funds from three residents of Ontario and one resident of Nova Scotia (the **Investors**).<sup>12</sup> Germeil, as partner and directing mind of FPE,<sup>13</sup> promoted FPE to the Investors as a foreign currency trading opportunity.

- [13] The Respondents were not registered with the NSSC to trade or distribute securities in any capacity, and FPE did not file a preliminary prospectus or prospectus with the NSSC during the Material Time, nor was it exempt from doing so.<sup>14</sup>
- [14] On October 3, 2013, FPE Trading was registered as a partnership/business name with the Nova Scotia Registry of Joint Stock Companies (the **NS Registry**), and its business was noted as online currency trading. On December 4, 2014, the status of FPE Trading with the NS Registry was revoked for non-payment of fees.<sup>15</sup>
- [15] Investors AA, BB and CC were residents of Ontario.<sup>16</sup> During the Material Time, they respectively invested \$18,000, \$7,000, and \$12,000 with the Respondents, and they did not receive a prospectus or account opening documentation.<sup>17</sup> Investors AA, BB and CC each received emails from the Respondents reflecting growth in their respective investments.<sup>18</sup> After requesting a withdrawal of funds from their accounts, Investors AA and CC received \$9,500 and \$1,300, respectively, from the Respondents.<sup>19</sup> Neither principal nor interest was returned to Investor BB.<sup>20</sup>
- [16] Investors AA and CC's funds were comingled into personal bank accounts controlled by Germeil and used by Germeil for day-to-day expenses.<sup>21</sup>
- [17] Investor DD was a resident of Nova Scotia and Germeil's neighbour.<sup>22</sup> During the Material Time, Investor DD invested \$500 with the Respondents, and signed a contract with FPE documenting the investment.<sup>23</sup> Investor DD did not receive a prospectus from the Respondents.<sup>24</sup> Investor DD did not receive back any of their funds. Only two of the Investors, AA and CC received a portion of their investments.<sup>25</sup>
- [18] The NSSC Panel concluded that<sup>26</sup>:

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<sup>12</sup> NSSC Merits Decision at paras 16-38

<sup>13</sup> NSSC Merits Decision at para 11

<sup>14</sup> NSSC Merits Decision at para 72

<sup>15</sup> NSSC Merits Decision at paras 11-12

<sup>16</sup> NSSC Merits Decision at paras 16, 23 and 29

<sup>17</sup> NSSC Merits Decision at paras 17-18, 24-25 and 30-31

<sup>18</sup> NSSC Merits Decision at paras 19, 26 and 32

<sup>19</sup> NSSC Merits Decision at paras 20 and 33

<sup>20</sup> NSSC Merits Decision at para 27

<sup>21</sup> NSSC Merits Decision at paras 22 and 35

<sup>22</sup> NSSC Merits Decision at para 36

<sup>23</sup> NSSC Merits Decision at para 37

<sup>24</sup> NSSC Merits Decision at para 38

<sup>25</sup> NSSC Sanctions Decision at paras 20 and 33

<sup>26</sup> NSSC Merits Decision at para 89

- a. the Respondents acted as a dealer without being registered to do so and without an available exemption from the dealer registration requirement, contrary to s. 31(1) of the NS Act;
- b. the Respondents distributed securities when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for them by the NSSC's Director and without an available exemption from the prospectus requirements, contrary to s. 58(1) of the NS Act;
- c. the Respondents engaged in unfair practices contrary to s. 44A(2) of the NS Act;
- d. the Respondents made untrue and misleading statements contrary to s. 50(2) of the NS Act; and
- e. the Respondents' conduct was contrary to the public interest and harmful to the integrity of the Nova Scotia capital markets.

**B. NSSC Order**

[19] The NSSC Order imposed the following sanctions on the Respondents pursuant to the NS Act:

- a. pursuant to s. 134(1)(a) of the NS Act, the Respondents comply with and cease contravening Nova Scotia securities laws;
- b. pursuant to s. 134(1)(b) of the NS Act, the Respondents permanently cease trading in securities of any issuer, other than securities beneficially owned by the Respondents;
- c. pursuant to s. 134(1)(c) of the NS Act, any or all of the exemptions contained in Nova Scotia securities laws do not apply to the Respondents permanently;
- d. pursuant to s. 134(1)(d) of the NS Act, Germeil be permanently prohibited from becoming or acting as a director or officer of an issuer;
- e. pursuant to s. 134(1)(g) of the NS Act, the Respondents be permanently prohibited from becoming or acting as a registrant, investment fund manager, or promoter;
- f. pursuant to s. 134(1)(h) of the NS Act, the Respondents be reprimanded;
- g. pursuant to s. 135 of the NS Act, the Respondents, jointly and severally, pay to the NSSC an administrative penalty of \$150,000; and
- h. pursuant to s. 135A of the NS Act, the Respondents, jointly and severally, pay costs in connection with the NSSC's investigation and conduct of its proceeding in the amount of \$15,000.

**IV. ANALYSIS**

[20] The issues for me to consider are:

- a. whether one of the circumstances under s. 127(10) of the Act applies to the Respondents; namely, are the Respondents subject to an order made by a securities regulatory authority imposing sanctions, conditions, restrictions or requirements (s. 127(10)4); and if so

- b. whether the Commission should exercise its jurisdiction to make a protective order in the public interest in respect of the Respondents pursuant to s. 127(1) of the Act.

**A. Subsection 127(10) of the Act**

- [21] Subsection 127(10) of the Act does not itself empower the Commission to make an order; rather, if the threshold criterion in s. 127(10) is met, then 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.
- [22] The NSSC is a securities regulatory authority. The NSSC Order, set out in paragraph [19] above, imposes sanctions on the Respondents. The threshold test under s. 127(10)<sup>4</sup> of the Act is therefore satisfied. I must now consider whether it is in the public interest to issue an order under s. 127(1) of the Act.

**B. Subsection 127(1) of the Act**

- [23] Orders made under s. 127(1) of the Act are "protective and preventative" and are made to restrain potential conduct which could be detrimental to the integrity of the capital markets and therefore prejudicial to the public interest.<sup>27</sup>
- [24] In exercising its jurisdiction to make an order in reliance on s. 127(10) of the Act, the Commission does not require a pre-existing connection to Ontario. However, it is a factor that can be considered by the Commission in exercising its discretion.<sup>28</sup>
- [25] The Commission may consider a number of factors in determining the nature and scope of sanctions to be ordered under s. 127(1) of the Act, including the seriousness of the misconduct, the harm suffered by investors, specific and general deterrence and any mitigating factors.<sup>29</sup>

**C. Appropriate Sanctions**

- [26] Staff submits that the Respondent's conduct warrants an order designed to protect Ontario investors from the Respondents, by limiting the Respondents' participation in Ontario's capital markets. I agree that such an order would be in the public interest, based upon the following factors.

**1. Seriousness of the Misconduct**

- [27] In this case, the NSSC Panel determined that the Respondents carried out numerous examples of serious misconduct. The dealer registration requirement was not fulfilled. The delivery of a prospectus was not carried out. The Respondents also engaged in unfair practices and made untrue statements.
- [28] Although the number of investors (four) and the amount of money lost by each was not large, I agree with the NSSC Panel that the Respondents' conduct

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<sup>27</sup> *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 26, [2001] 2 SCR 132 (SCC) at paras 42-43

<sup>28</sup> *Biller (Re)*, 2005 ONSEC 15, (2005) 28 OSCB 10131 at paras 32-35

<sup>29</sup> *Belteco Holdings Inc (Re)*, (1998) 21 OSCB 7743 at 7746-7747; *MCJC Holdings (Re)*, (2002) 25 OSCB 1133 at 1136

throughout the Material Time constitutes serious misconduct.<sup>30</sup> I also note that this misconduct is prohibited by our Act. I also agree with the NSSC Panel's conclusion that the Respondents' conduct was contrary to the public interest. I find this misconduct to be harmful to the integrity of the capital markets in Ontario as demonstrated by the examples of misconduct listed above and also considering the fact that three of the four investors were from Ontario.

## **2. Harm Suffered by Investors**

[29] Other factors I considered come from additional findings of the NSSC Panel. For example, the NSSC Panel determined that the investors suffered harm by being falsely told that their money would be invested in the foreign exchange market and a profit would be made.<sup>31</sup> Further, even though amounts invested were not large, as noted by the NSSC Panel "they could have been significant losses for the Investors personally".<sup>32</sup>

## **3. Enrichment of the Respondents**

[30] Another important factor was that Germeil was personally enriched. The investors' funds were comingled with Germeil's personal bank accounts and used to pay Germeil's day-to-day expenses, without the investors' consent and knowledge.

## **4. Mitigating Factors**

[31] I note that the Respondents did not participate in the proceeding before the NSSC and this Commission. Accordingly, there is no evidence of any mitigating factors.

## **5. Conclusion of Appropriate Sanctions**

[32] It is important that this Commission impose sanctions that will protect Ontario investors by specifically deterring the Respondents from engaging in similar or other misconduct in Ontario, and by acting as a general deterrent to other like-minded persons. I accept Staff's submission that the sanctions requested are proportionate to the Respondents' misconduct and it would be appropriate for me to issue a substantially similar order to that of the NSSC to the extent possible under the Act, but also to include a prohibition against trading derivatives, for the reasons elaborated below.

### **D. Difference between NSSC and Ontario Sanctions**

[33] Due to differences between the Act and the NS Act, some of the sanctions I impose in Ontario differ from those imposed in Nova Scotia, as outlined below.

[34] First, the NSSC ordered that pursuant to s.134(1)(a) of the NS Act, the Respondents comply with and cease contravening Nova Scotia securities laws. There is no equivalent to s. 134(1)(a) of the NS Act in Ontario's Act. Subsection 127(1) of the Act does not provide the Commission with the authority to make such an order.

[35] Second, the NSSC also ordered that pursuant to s.134(1)(g), the Respondents be permanently prohibited from becoming or acting as a registrant, investment

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<sup>30</sup> NSSC Sanctions Decision at paras 19 and 27

<sup>31</sup> NSSC Sanctions Decision at para 20

<sup>32</sup> NSSC Sanctions Decision at para 21

fund manager, or promoter. As set out by the Commission in previous decisions,<sup>33</sup> the distinction between a “registrant” and “investment fund manager” is unnecessary, given that the definition of “registrant” in s. 1(1) of the Act includes an investment fund manager, by virtue of s. 25(4) of the Act. As a result, the order I shall issue refers to registrants, which term includes investment fund managers.

- [36] Third, while both the NS Act and the Act provide the authority to prohibit trading in securities and derivatives, the NSSC ordered only that the Respondents cease trading in securities of any issuer. However, Staff requested an order prohibiting trading both securities and derivatives. I asked Staff to provide additional written submissions to explain why a cease trade order relating to derivatives is in the public interest in Ontario.
- [37] In its supplementary written submissions filed August 26, 2019, Staff submitted that an Ontario order that extended to derivatives would be only slightly more restrictive than the NSSC Order and would impact the Respondents only should they choose to participate in the Ontario capital markets. Staff takes the position that such an order is necessary in Ontario because the NSSC found that the Respondents pose serious risks to both investors and the integrity of the capital markets.
- [38] Further, Staff emphasized that the Commission may make an order that differs from the originating jurisdiction (in this case the NSSC) as the Commission retains full discretion to make any order authorized by s. 127(1) of the Act that it believes to be in the public interest.<sup>34</sup> Staff also referred to me examples where the Commission has previously made orders that differed from the originating jurisdiction.<sup>35</sup>
- [39] In particular, in the *Lim* case, which originated in British Columbia, the British Columbia Securities Commission did not prohibit trading in derivatives. In this regard, *Lim* was similar to the NSCC decision in this case. Nevertheless, in *Lim*, this Commission agreed that it was in the public interest for the respondents to be permanently prohibited in Ontario from trading in both securities and derivatives, in view of the findings concerning their manipulative conduct.<sup>36</sup>
- [40] Therefore, it is my view that trading in any securities or derivatives by the Respondents shall cease permanently, other than in securities or derivatives beneficially owned by them, as they represent a serious future risk to investors and to the integrity of the capital markets. I note that while the NSSC Panel found that the Respondents represented a serious risk, the NSSC Panel did afford the Respondents an exception to the trading prohibition and Staff did not request denying the Respondents this exception.

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<sup>33</sup> See *Inverlake Property Investment Group Inc (Re)*, 2018 ONSEC 35, (2018) 41 OSCB 5309 (***Inverlake***) at para 39; *Vantooen (Re)*, 2018 ONSEC 36, (2018) 41 OSCB 5603 at para 30

<sup>34</sup> *Inverlake* at para 28

<sup>35</sup> *Lim (Re)*, 2018 ONSEC 39, (2018) 41 OSCB 6045 (***Lim***); *Black (Re)*, 2015 ONSEC 4, (2015) 38 OSCB 2043. See also *Bochinski (Re)*, 2017 BCSECCOM 300 at para 10, where the British Columbia Securities Commission made a similar finding under the British Columbia *Securities Act*.

<sup>36</sup> *Lim* at para 14

**V. ORDER**

[41] For the reasons set out above, I find that it is in the public interest to grant an order pursuant to the authority provided in s. 127(1) of the Act, and as requested by Staff. This will protect the Ontario capital markets from the Respondents, as well as deter other persons who may wish to conduct similar misconduct in Ontario. I therefore order:

1. Against Germeil that:

- (a) trading in any securities or derivatives by Germeil shall cease permanently, other than in securities or derivatives beneficially owned by him, pursuant to paragraph 2 of s. 127(1) of the Act;
- (b) any exemptions contained in Ontario securities law do not apply to Germeil permanently, pursuant to paragraph 3 of s. 127(1) of the Act;
- (c) Germeil resign any positions that he holds as a director or officer of any issuer, pursuant to paragraph 7 of s. 127(1) of the Act;
- (d) Germeil be prohibited permanently from becoming or acting as a director or officer of any issuer, pursuant to paragraph 8 of s. 127(1) of the Act; and
- (e) Germeil be prohibited permanently from becoming or acting as a registrant or promoter, pursuant to paragraph 8.5 of s. 127(1) of the Act;

2. Against FPE Trading that:

- (a) trading in any securities or derivatives by FPE Trading cease permanently, other than securities or derivatives beneficially owned by it, pursuant to paragraph 2 of s. 127(1) of the Act;
- (b) any exemptions contained in Ontario securities law do not apply to FPE Trading permanently, pursuant to paragraph 3 of s. 127(1) of the Act; and
- (c) FPE Trading be prohibited permanently from becoming or acting as a registrant or promoter, pursuant to paragraph 8.5 of s. 127(1) of the Act.

Dated at Toronto this 17<sup>th</sup> day of October, 2019.

"Raymond Kindiak"

Raymond Kindiak