

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Executive Marketing & Strategies Ltd., Re, 2008 ABASC 384 Date: 20080613

**Executive Marketing & Strategies Ltd.,
Carol Jean Sayers, Jennifer Dawn Sayers and Ryan Kristen Sayers**

Panel:	Glenda A. Campbell, QC Stephen R. Murison
Appearing:	Tom Percy and Don Young for Commission Staff
	Robert Hladun, QC for the Respondents
Date of Hearing:	30 May 2008
Date of Decision:	13 June 2008

I. INTRODUCTION

[1] A 17 April 2008 amended notice of hearing issued by staff ("Staff") of the Alberta Securities Commission (the "Commission") made allegations of capital market misconduct against Executive Marketing & Strategies Ltd. ("EMS"), Carol Jean Sayers ("CJS"), Jennifer Dawn Sayers ("JDS") and Ryan Kristen Sayers ("RKS") (collectively, the "Respondents"; we refer to the latter three as the "Individual Respondents"). Staff indicated in the amended notice of hearing that they would seek sanctions and costs orders against the Respondents.

[2] Staff and the Respondents came to an agreement as to certain facts, and as to appropriate sanctions and costs orders, as set out in a Statement of Admissions and Joint Recommendation as to Sanction (the "Statement") executed by the Respondents on 15 May 2008. Although Staff were not signatories to the Statement, they effectively adopted its contents.

[3] This matter came to a hearing on 30 May 2008 (the "Hearing"). The parties were represented at the Hearing by counsel, who made brief oral submissions. The parties confirmed that their joint position as to the facts and appropriate orders was reflected in the Statement. The Respondents acknowledged in the Statement that each had sought independent legal advice – counsel for the Respondents confirmed this at the Hearing – and that each had voluntarily made the admissions therein.

[4] We accepted the facts and admissions set out in the Statement as evidence and, there being no dispute as to their content, as being true.

[5] Based on those facts and admissions, we are ordering sanctions against the Respondents, and the payment of costs, largely consistent with the parties' joint proposal. Our decision and reasons follow.

II. FACTS AND FINDINGS

[6] We summarize here relevant facts, drawn for the most part from the Statement, and certain of our findings.

A. Respondents

[7] EMS was incorporated in Alberta in 2004. EMS is not a reporting issuer in Alberta, has never filed with or received a receipt for a preliminary or final prospectus from the Executive Director of the Commission and has never been registered in any capacity with the Executive Director.

[8] According to the Statement, the "stated business" of EMS involves lending money to ticket brokers and ticket promoters ("Brokers"), financed through the sale of securities to the public.

[9] CJS, a resident of Calgary, Alberta, has never been registered in any capacity with the Executive Director. At all material times, she was a director, officer and shareholder of EMS.

[10] JDS, a resident of Calgary, Alberta, has never been registered in any capacity with the Executive Director. At all material times, she was a director, officer and shareholder of EMS.

[11] RKS, a resident of Calgary, Alberta, is the son of CJS and the husband of JDS. RKS was registered with the Executive Director as a salesperson from February 2000 to June 2001 but has not been registered in any capacity since that time. At all material times, he was a director, officer and shareholder of EMS.

[12] None of the Respondents has previously been sanctioned by the Commission.

B. Trades and Distributions

[13] Between June 2005 and September 2006, the Individual Respondents solicited investments in EMS in the form of loan agreements ("Loan Agreements") for various terms and at various rates of interest, with returns to be paid monthly (4-7%) or quarterly (18-34%); we infer that the specified rate was a percentage of the amount invested. In this way, the Respondents raised approximately \$10 million from over 300 residents of Alberta, British Columbia, Saskatchewan, Manitoba, Ontario, Nova Scotia, the United States and Europe (collectively, the "Investors"). Approximately 90% of the Investors were residents of Alberta.

[14] There was no suggestion that any exemption from the registration and prospectus requirements of Alberta securities laws was available to, or relied upon by, the Respondents in respect of this activity.

[15] The money so raised was to be lent by EMS to Brokers for their purchase of large blocks of event tickets, which were then to be resold at a profit. In return, the Brokers were to pay EMS a return exceeding what EMS had agreed to pay to the Investors, and EMS was then to pay the agreed returns to the Investors.

[16] EMS failed to demonstrate to Staff that all of the money raised through the Loan Agreements was applied as represented.

[17] The Individual Respondents personally benefited from the money received by EMS from the Loan Agreements.

C. Investigation and Existing Orders

[18] The Respondents withheld information reasonably required for Staff's investigation under the Act, resulting in delays in the investigation.

[19] In addition, RKS made false and misleading statements to Staff during an investigative interview.

[20] The Respondents are subject to a 14 November 2006 Commission order freezing certain bank accounts. According to the Statement, the frozen accounts contain C\$377 272.43 and US\$17 523.43, which will be available to third parties, including Investors in Alberta, who are able to establish entitlement to that money in judicial proceedings.

[21] The Respondents are also subject to a 31 January 2007 Commission order – extended on 23 February 2007 until a hearing in this matter is concluded and a decision rendered (or until otherwise ordered) – barring the Respondents from trading in all securities, denying them the use of exemptions under Alberta securities laws and barring trading in securities of EMS (the "Interim Order").

D. Costs Incurred

[22] Staff submitted at the Hearing, and the Respondents did not dispute, that costs incurred in the investigation up to June or July 2007 amounted to approximately \$55 000.

E. Admissions and Findings of Contraventions of Act

[23] The Respondents admit – and we find – that the Loan Agreements were "securities", that entering into the Loan Agreements with Investors in Alberta constituted "trades" in securities, and that these were trades in securities that had not been previously issued and thus were "distributions", within the meanings of those terms under the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act").

[24] The Respondents admit – and we find – that by acting as described above they breached:

- section 75(1) of the Act, by trading in securities with Alberta residents without being registered with the Executive Director; and
- section 110(1) of the Act, by distributing securities of EMS to Alberta residents without filing with and receiving a receipt for a preliminary and final prospectus from the Executive Director.

F. Admissions and Findings on Public Interest

[25] The Respondents acknowledge that their failures to comply with the registration and prospectus requirements of the Act and to produce relevant records – and, in the case of RKS, his failure to respond (as the Statement put it) "faithfully" to Staff questions – amount to "conduct that was contrary to the public policy".

[26] This Commission has commented frequently on the purposes of the registration and prospectus requirements. The prospectus requirement is designed to provide a prospective investor with comprehensive and reliable disclosure about an issuer and its securities to assist in making an informed investment decision, while the registration requirement provides for the involvement of an intermediary who can assess the suitability of an investment in light of a prospective investor's financial circumstances, investment objectives and risk tolerance. These are core requirements of our securities regulatory regime. Trading and distributing securities in contravention of these fundamental requirements, which deprives investors of fundamental protections to which they are entitled by law, is serious misconduct.

[27] Staff have important responsibilities in monitoring and enforcing compliance with Alberta securities laws. Their task is not assisted by obstruction or want of honesty on the part of those who are the subject of investigation.

[28] For these reasons, we find that the conduct of each of the Respondents was contrary to the public interest.

III. JOINT PROPOSAL AS TO ORDERS

[29] Staff and the Respondents jointly proposed that the following sanctions and costs orders be made against the respective Respondents:

- against EMS:
 - permanent cease-trade and denial-of-exemptions orders;
 - an administrative penalty of \$100 000; and
 - an order for payment of \$15 000 towards investigation costs;

- against CJS:
 - 10-year cease-trade and denial-of-exemptions orders (from the date of the Statement) with an exception to permit her to trade in securities in a registered retirement savings plan (an "RRSP", as defined in the *Income Tax Act* (Canada)) account through a registrant who has first been shown a copy of the Statement;
 - a 10-year director-and-officer ban;
 - an administrative penalty of \$100 000; and
 - an order for payment of \$15 000 towards investigation costs;

- against JDS:
 - 7-year cease-trade and denial-of-exemptions orders (from the date of the Statement) with an exception to permit her to trade in securities in an RRSP account through a registrant who has first been shown a copy of the Statement;

- a 7-year director-and-officer ban;
 - an administrative penalty of \$40 000; and
 - an order for payment of \$10 000 towards investigation costs; and
- against RKS:
 - 15-year cease-trade and denial-of-exemptions orders (from the date of the Statement) with an exception to permit him to trade in securities in an RRSP account through a registrant who has first been shown a copy of the Statement;
 - a 15-year director-and-officer ban;
 - an administrative penalty of \$250 000; and
 - an order for payment of \$25 000 towards investigation costs.

IV. SANCTIONS

A. Law

[30] The sanctions jointly proposed by Staff and the Respondents are within the contemplation of sections 198 and 199 of the Act. We are empowered to make such orders if we are of the opinion that it is in the public interest to do so. As an administrative tribunal performing a regulatory function, we are to exercise that public interest authority with a view to protection and prevention; such orders are not designed to punish or remedy (see *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45; and *Re Podorieszach*, 2004 ABASC 567 at para. 17). Deterrence is an appropriate object of our orders – both specific deterrence (detering a particular respondent from future similar misconduct) and general deterrence (detering others from similar misconduct) (see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62).

[31] As the Respondents acknowledged in the Statement, the parties' joint proposal as to orders does not bind the panel. We consider the appropriateness of their joint proposal on sanction in light of the principles and objectives just mentioned, having regard to potentially relevant factors including the following (which were enumerated in *Re Lamoureux*, [2002] A.S.C.D. 125 at para. 11, *aff'd* on other grounds 2002 ABCA 253):

- the seriousness of the allegations proved against the respondent,
- the respondent's past conduct, including prior sanctions,
- mitigating factors,
- the respondent's experience in the capital markets,
- the level of the respondent's activity in the capital markets
- whether the respondent recognizes the seriousness of the improper activity
- the harm suffered by investors as a result of the respondent's activities
- the benefits received by the respondent as a result of the improper activity
- the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction

- the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities
- the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity
- the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets and
- previous decisions made in similar circumstances

[32] Although not bound by joint proposals on sanction, we incline to issue orders consistent therewith if we are satisfied that they fall within a range of sanctions we consider will reasonably serve the public interest; see *Re TSS Management Corp.*, 2008 ABASC 215 at para. 24:

While we are not bound to order jointly proposed sanctions, we will do so if we are satisfied that they fall within a range of sanctions we perceive will reasonably serve the public interest. As this Commission explained in *Re Daystar Holdings Inc.*, 2008 ABASC 120 at para. 19:

The role of a panel reviewing agreed statements of facts and joint submissions on appropriate sanction is not to impose the sanction we would order after a full hearing. Rather we are to ensure that the parties provided the panel with the facts necessary to decide the case and that the proposed sanctions are within a range of sanctions that we consider reasonable in the circumstances of the particular respondents. This approach recognizes that the panel is not aware of all the considerations that the parties faced when reaching their agreed position on fact and sanction.

B. Sanctions are in the Public Interest

[33] The Respondents raised a large amount of money from a large number of Investors, inside and outside Alberta, on the promise of highly attractive returns. As mentioned, the Individual Respondents applied some of the money for their own personal benefit. The Respondents deprived Investors in Alberta of fundamental protections to which they were entitled under Alberta securities laws. We have found that, in so doing, the Respondents also acted contrary to the public interest.

[34] This misconduct by the Respondents was serious. Although we do not know whether, or to what extent, Investors in Alberta have or will suffer actual financial losses on their Loan Agreements, the evidence is clear that they were certainly exposed to the risk of considerable loss. The illegal nature of the EMS distribution also exposed others to harm: this type of misconduct can jeopardize confidence in the Alberta capital market, and thereby impair the ability of legitimate businesses to raise investment money in accordance with the law.

[35] We consider that sanctions are in the public interest. The investing public must be protected from a recurrence of this sort of activity. The Respondents must be deterred from engaging in the same or similar misconduct. We must also deter others who, observing the apparent ease with which the Respondents illegally raised so much money, might be tempted to act similarly. In our view, the sanctions must combine direct monetary orders with significant restrictions on the Respondents' future access to the Alberta capital market. In respect of EMS specifically, we do not believe that there are any grounds for its securities to trade again or for EMS ever again to have access to the Alberta capital market.

[36] There is a further matter of importance. None of the Respondents, by their admission, was cooperative at least in the early stages of Staff's investigation. RKS compounded this lack of cooperation by making false and misleading statements to Staff. This is unacceptable behaviour by any capital market participant and itself merits sanction. RKS's admitted misconduct in this being greater than that of the others, the sanctions against him should, in the public interest, be commensurately greater.

[37] We discern only two factors that tend toward moderation in sanction. First, none of the Respondents has previously been sanctioned by the Commission.

[38] Second, by agreeing with Staff as to facts and appropriate sanctions, the Respondents have obviated the need for a potentially costly and time-consuming contested hearing. We consider such efforts to facilitate the efficient resolution of proceedings to be in the public interest. In the circumstances, this also mitigates, to some extent, the Respondents' uncooperative conduct in the investigation.

C. Conclusion

[39] In sum, for the reasons given, we consider that the public interest in this case warrants significant sanctions against each Respondent – particularly against RKS and including, in respect of EMS, permanent removal from the Alberta capital market.

[40] We are generally satisfied that the sanctions jointly proposed by the parties are of types, and fall within a range, that provide appropriate protection and deterrence consistent with the public interest. However, we are of the view the public interest requires not only (as the Statement contemplated) that EMS itself cease trading in and purchasing securities, but also (this was omitted from the Statement) that EMS securities no longer be traded or purchased, by anyone. We also consider that the exceptions proposed for the Individual Respondents to permit their trading in RRSP accounts are not incompatible with the public interest, but we believe that any registrant handling such trading should be given a copy of this decision rather than (or, if the Individual Respondents so choose, in addition to) a copy of the Statement.

V. COSTS

[41] Although the Statement suggests that the parties view orders for the payment of costs as a form of sanction, they are not. Their purpose is different. Essentially, such orders recompense the Commission for costs incurred in investigating capital market misconduct and, potentially, conducting enforcement hearings.

[42] The parties jointly proposed that each Respondent be ordered to make a payment towards investigation costs, such payments amounting in the aggregate to \$65 000, the largest portion of that to be paid by RKS.

[43] We agree that this is an appropriate case for the Respondents, or some of them, to pay a large portion – indeed, we see no reason why they should not pay all – of the costs of the investigation. In this regard, we take particular note of their admitted lack of cooperation at least in the early stages of the investigation. Noting also RKS's false and misleading responses to Staff questions, we agree that he should pay the largest portion of such costs.

[44] However, we do not blindly make costs orders, even with the parties' concurrence. Simply stated, given that the purpose of costs orders is to recompense the Commission for costs it has incurred, we must be satisfied that any amount sought has indeed been incurred.

[45] Here, the only evidence on this point is Staff's undisputed submission that approximately \$55 000 was incurred in the investigation up to June or July 2007. This represented, according to Staff, approximately 60-70% of the total costs incurred (whether investigation, or investigation and hearing, costs was unclear). We do not doubt that additional costs were incurred from June or July 2007, including in discussions about the Statement and in preparing for and attending the brief Hearing. However, we do not consider ourselves to be in a position to quantify such additional costs.

[46] We are left, then, with evidence that approximately \$55 000 in investigation costs were incurred. We think that the Respondents, or some of them, should, collectively, pay that amount. We are not, in the circumstances, prepared to order that they pay more than that.

[47] As among the Respondents, we think that the case for a costs order against EMS is the least compelling. We consider that money paid by EMS in response to such an order is money not available to the Investors. Costs orders not having the same purposes as sanctions, deterrence is not a factor as it was in our assessment of an administrative penalty against EMS. We therefore decline to order that EMS pay any costs of the investigation.

[48] In respect of the Individual Respondents, and taking note of the parties' joint proposal on costs orders, we conclude that the amounts proposed in respect of CJS and JDS (\$15 000 and \$10 000 respectively) are appropriate, and that RKS should pay the balance of the undisputed investigation costs (\$30 000) which is slightly more than the amount proposed in respect of him.

VI. ORDERS

A. Sanctions

[49] For the reasons given, we make the orders set out below in the public interest.

Executive Marketing & Strategies Ltd.

[50] Under sections 198(1)(a), (b) and (c) of the Act, all trading in and purchasing of securities of EMS must cease, EMS must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to EMS, permanently.

[51] Under section 199 of the Act, EMS must pay an administrative penalty of \$100 000.

Carol Jean Sayers

[52] Under sections 198(1)(b) and (c) of the Act, CJS must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to CJS, for 10 years from 15 May 2008, except that this order does not preclude her from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in an RRSP account for her benefit.

[53] Under sections 198(1)(d) and (e) of the Act, CJS must resign all positions she holds as a director or officer of any issuer, and CJS is prohibited for 10 years from 15 May 2008 from becoming or acting as a director or officer (or both) of any issuer.

[54] Under section 199 of the Act, CJS must pay an administrative penalty of \$100 000.

Jennifer Dawn Sayers

[55] Under sections 198(1)(b) and (c) of the Act, JDS must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to JDS, for 7 years from 15 May 2008, except that this order does not preclude her from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in an RRSP account for her benefit.

[56] Under sections 198(1)(d) and (e) of the Act, JDS must resign all positions she holds as a director or officer of any issuer, and JDS is prohibited for 7 years from 15 May 2008 from becoming or acting as a director or officer (or both) of any issuer.

[57] Under section 199 of the Act, JDS must pay an administrative penalty of \$40 000.

Ryan Kristen Sayers

[58] Under sections 198(1)(b) and (c) of the Act, RKS must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to RKS, for 15 years from 15 May 2008, except that this order does not preclude him from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in an RRSP account for his benefit.

[59] Under sections 198(1)(d) and (e) of the Act, RKS must resign all positions he holds as a director or officer of any issuer, and RKS is prohibited for 15 years from 15 May 2008 from becoming or acting as a director or officer (or both) of any issuer.

[60] Under section 199 of the Act, RKS must pay an administrative penalty of \$250 000.

B. Payment of Costs

[61] For the reasons given, we also make the following orders under section 202(1) of the Act for payment towards the costs of the investigation:

- CJS must pay \$15 000;
- JDS must pay \$10 000; and
- RKS must pay \$30 000.

C. Interim Order Expires

[62] The Interim Order expires by its terms with the issuance of this decision.

D. Proceeding Concluded

[63] This proceeding is now concluded.

13 June 2008

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Stephen R. Murison