



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue queen oust
Toronto ON M5H 3S8

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**IN THE MATTER OF
MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC REAL ESTATE
PROJECTS LTD., FIC FORECLOSURE FUND LTD. and WBIC CANADA LTD.**

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

Hearing: In Writing

Decision: May 16, 2017

Panel: D. Grant Vingoe Vice-Chair and Chair of the Panel

Appearances: Malinda N. Alvaro For Staff of the Commission

Ahmad Mozaffari For Michael Patrick Lathigee

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REASONS AND DECISION

I. INTRODUCTION

- [1] The merits hearing in this proceeding was conducted as a written hearing before the Ontario Securities Commission (the "Commission") to determine whether it is in the public interest to make an order imposing sanctions against Michael Patrick Lathigee ("Mr. Lathigee"), Earle Douglas Pasquill (Mr. Pasquill"), FIC Real Estate Projects Ltd. ("FIC Projects"), FIC Foreclosure Fund Ltd. ("FIC Foreclosure") and WBIC Canada Ltd. ("WBIC") (collectively, the "Respondents").
- [2] The Respondents were served with a Notice of Hearing issued on November 9, 2016 and a Statement of Allegations dated November 8, 2016. Mr. Lathigee appeared by teleconference, on the return date for the hearing, on his own behalf and on behalf of FIC Projects Ltd. FIC Foreclosure Fund Ltd. and WBIC (collectively, the "Corporate Respondents"). Mr. Pasquill did not participate in the proceeding, although properly served. At the merits hearing, Mr. Lathigee was represented by counsel. The Corporate Respondents did not participate in the merits hearing.

II. ANALYSIS

A. The British Columbia Securities Commission Decision

- [3] On July 8, 2014, the British Columbia Securities Commission (the "BCSC") found that each of the Respondents perpetrated a fraud in contravention of sections 57(b) of the *Securities Act*, RSBC 1996, c. 418 (the "BC Act"). The decision is reported at *Michael Patrick Lathigee et al. (Re)*, 2014 BCSECCOM 264.
- [4] The conduct for which the Respondents were sanctioned took place between approximately February and August of 2008 (the "Material Time").
- [5] During the Material Time, Mr. Lathigee and Mr. Pasquill were residents of British Columbia. Mr. Lathigee and Mr. Pasquill jointly directed and controlled a group of companies called Freedom Investment Club ("FIC Group"). Mr. Lathigee and Mr. Pasquill were the sole individuals directing the affairs of the FIC Group, which included the Corporate Respondents.
- [6] Mr. Lathigee and Mr. Pasquill were directors and officers of all of the companies in the FIC Group, including the Corporate Respondents. Further, Mr. Lathigee and Mr. Pasquill were, respectively, the CEO and president of FIC Projects and WBIC, and the president and secretary of FIC Foreclosure.
- [7] FIC Group was Mr. Lathigee's concept. The idea was to educate investors about the investment and provide opportunities to investors to participate in FIC Group offerings. The meetings typically had a so-called educational component accompanied by a presentation, typically made by Mr. Lathigee about current investment opportunities.
- [8] FIC Group's primary business was real estate development. Several different FIC Group companies were involved in various development projects. FIC Group's largest development project was Genesis on the Lakes ("Genesis"), a residential development near Edmonton, Alberta. Genesis was being developed in two phases. The first phase was divided into two sub-phases, 1A and 1B. Phase 1A of the Genesis project was financed by credit facilities and loans with a Canadian

bank (the "Canadian Bank") to an FIC Group company called Genesis on the Lakes Ltd.

The Credit Facility

- [9] FIC Group's credit facility at the Canadian Bank totalled \$22.1 million (the "Credit Facility"). Security for the Credit Facility included a \$22.1 million first mortgage against the Genesis project lands, an assignment of an investment portfolio held by a FIC Group company called 0760838 BC Ltd. ("076") and an assignment of \$3 million of FIC Group term deposits and credit balances.
- [10] FIC Group was required to maintain the market value of the 076 investment portfolio at a minimum market value of \$9 million for the life of the Genesis project. The Credit Facility also required that no subsequent encumbrances be filed on the Genesis lands subject to the mortgage.
- [11] At the end of January 2008, the market value of the 076 portfolio was \$7.1 million, a deficiency of nearly \$2 million. By the end of May 2008, the market value had fallen to \$4.9 million, a deficiency of over \$4 million. The evidence indicated that only on one day during the Material Time was the portfolio value close to the \$9 million requirement.
- [12] On February 7, 2008, contractors registered builders' liens totalling \$5 million against Phase 1 of the Genesis project.
- [13] From March to May of 2008, Mr. Lathigee, Mr. Pasquill and other members of the FIC Group management team repeatedly expressed concern over the status of the Credit Facility.
- [14] The BCSC Panel found that the sustained material shortfall in the market value of the 076 investment portfolio and filed liens were a material default of the requirements under the Credit Facility. The BCSC Panel further found that the FIC Group was exposed to the significant risk that the Canadian Bank might decide to call the loans immediately, and if it had done so, the FIC Group would have immediately become insolvent.

Genesis Project Status

- [15] At the end of January 2008, the FIC Group combined financial statements showed that Genesis contractors were owed \$9.6 million for work completed to that date. By the end of February 2008, the Genesis contractor had billed at least \$8 million for work done ahead of the project budget schedule, relating to the second phase of the project, whereas the Credit Facility was only for the first phase. There was no funding for phase two, and the contractor was looking for payment.
- [16] FIC Group management repeatedly expressed their concerns about this cost overrun. Mr. Lathigee proposed an offering to FIC Group members for equity participation in Genesis. The equity idea was not pursued.
- [17] The BCSC Panel found that Genesis incurred \$10 million in cost overruns that FIC Group could not account for and that there was no other source to fund the \$8 million in contractor invoices that did not qualify for funding under the Credit Facility. Further, the BCSC Panel found that the profit expectations for Genesis were diminished, with no profit expectation for the first phase of the Genesis

project and that the expectations for the second phase were cut in half and could have been zero.

Cash Flow Problems

- [18] Starting in January 2008, FIC Group management began to express concerns over the FIC Group's cash flow position. Up to July 2008, FIC Group's management repeatedly expressed concern through a series of e-mail exchanges over incoming liabilities and their inability to meet their financial obligations.
- [19] Starting in February 2008, FIC Group management raised funds through FIC Foreclosure. Starting in March 2008, funds were raised through a FIC Projects distribution, and a further distribution commenced in April 2008 through WBIC.
- [20] As funds from the distributions made by the FIC Group entities flowed in, Mr. Lathigee and Mr. Pasquill diverted them towards meeting FIC Group's existing liabilities, including funding the 076 investment portfolio deficiency. Funds were distributed among other FIC Group entities according to where cash was needed through a web of inter-company loan arrangements.
- [21] Despite the persistent cash shortfall during the Material Time, Mr. Lathigee sought further funds to invest in foreclosures.
- [22] The BCSC Panel found that the FIC Group was experiencing severe cash flow problems during the Material Time and that management had given their close attention to the cash flow issues throughout the Material Time, demonstrating concern through their communications.

Important Facts

- [23] The BCSC Panel found that the defaults on the Credit Facility, the Genesis project status and cash flow problems in the FIC Group entities were each important facts. In combination, these facts further revealed the important fact that there was a reasonable possibility that FIC Group could become insolvent during the Material Time.

The FIC Projects and WBIC Distributions

- [24] On March 7, 2008, Mr. Lathigee held a conference call and webcast to promote a distribution by FIC Projects, describing it as a "cash flow opportunity".
- [25] During that conference call, Mr. Lathigee stated that the FIC Group had over \$100 million in real estate assets and was seeking to raise \$10 million. The promissory notes offered paid annual interest of 12 to 15 percent depending on the investment amount. Mr. Lathigee further told conference call participants that the purpose of the distribution was to enable FIC to more quickly develop its Edmonton real estate projects.
- [26] The reference to the \$100 million in assets did not account for encumbrances associated with those assets, which were approximately \$50 million at the time.
- [27] There was no mention of the FIC Group's financial condition, namely its severe cash flow problems, during the conference call. Nor was there any disclosure of the FIC Group's financial condition in the offering memorandum for the WBIC distribution.
- [28] In March, April and July 2008, FIC Projects issued promissory notes to 267 investors for proceeds of \$9.8 million.

- [29] In April and May 2008, WBIC issued Class A shares to 100 investors for proceeds of \$2 million.
- [30] The BCSC Panel found that none of the funds raised from the FIC Projects distribution were used towards anything that would produce cash flow for investors. Instead, \$5 million was used to top up the 076 investment portfolio and to pay Genesis contractors to remove the liens, \$3.4 million was split between funds returned to FIC Foreclosure and funds held in reserve to meet interest payments on the promissory notes themselves, with the remaining \$1.6 million going to overhead and third-party payments.

Misuse of Funds by FIC Foreclosure

- [31] From February to April 2008, FIC Foreclosure raised \$1.5 million through the distribution of Class A shares to 39 investors under the accredited investor exemption. From April to June 2008, FIC Foreclosure raised another \$8.4 million through the distribution of Class A shares to another 292 investors under the offering memorandum exemption.
- [32] In the subscription agreements, offering memorandum and conference call held by Mr. Lathigee, investors were told that FIC Foreclosure was formed expressly for the purpose of investing in foreclosure properties in the US residential real estate market. Mr. Lathigee further told investors that there were large inventories available and FIC Foreclosure had to act quickly and also that FIC Foreclosure was on the verge of making a number of acquisitions.
- [33] Mr. Lathigee also told investors during the conference call that FIC Foreclosure could earn an annualized return of 132% over a period of six months.
- [34] Of the \$9.9 million raised, only \$1.4 million was spent on foreclosure properties and another \$751,000 on rental properties and tax liens. The funds were never used for their stated purpose. Most of the funds, about \$7.8 million, were transferred to other FIC Group companies in order to, among other things, pay existing liabilities and overhead expenses of the FIC Group.

B. The BCSC Findings and Order

- [35] In its Findings, the BCSC Panel concluded that:
 - (a) Mr. Lathigee, Mr. Pasquill, FIC Foreclosure, FIC Projects and WBIC perpetrated a fraud, contrary to section 57(b) of the BC Act when they raised \$21.7 million from 698 investors without disclosing to those investors the important fact of FIC Group's financial condition; and
 - (b) Mr. Lathigee, Mr. Pasquill and FIC Foreclosure perpetrated a fraud, contrary to section 57(b) of the BC Act when they raised \$9.9 million from 331 investors in FIC Foreclosure for the purpose of investing in foreclosure properties and instead used most of the funds to make unsecured loans to other FIC Group companies.
- [36] The BCSC considered the nature of the conduct, including fraud, the harm to investors, the principles of specific and general deterrence and with reference to similar orders in analogous situations, made the following order in the public interest:
 - (a) upon the Corporate Respondents:

- i. under sections 161(1)(b)(i), (d)(v) and (c) of the BC Act, respectively:
 - 1. all persons permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts of the Corporate Respondents;
 - 2. the Corporate Respondents are permanently prohibited from engaging in investor relations activities;
 - 3. the exemptions set out in the BC Act, the regulations or any decision as defined in the BC Act, do not apply to the Corporate Respondents permanently;
 - ii. under section 161(1)(g) of the BC Act, that:
 - 1. FIC Projects pay to the BCSC \$9.8 million;
 - 2. FIC Foreclosure pay to the BCSC \$9.9 million; and
 - 3. WBIC pay to the BCSC \$2 million;
- (b) upon Mr. Lathigee:
- i. under sections 161(d)(i), (b)(ii), (d)(ii) to (v) and (c) of the BC Act, respectively:
 - 1. Lathigee resign any position he holds as a director or officer of an issuer or registrant;
 - 2. Lathigee cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of the BCSC Order and this Order;
 - 3. Lathigee is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant, except that he may act as a director or officer of one issuer whose securities are solely owned by him or by him and his immediate family members;
 - 4. Lathigee is permanently prohibited from becoming or acting as a promoter;
 - 5. Lathigee is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
 - 6. Lathigee is permanent prohibited from engaging in investor relations activities; and
 - 7. except for those exemptions necessary to allow Lathigee to trade or purchase securities and exchange contracts for his own account, the exemptions set out in the BC Act, the regulations or any decision as defined in the BC Act, do not apply to Lathigee permanently;
 - ii. under section 161(1)(g) of the BC Act, that Lathigee pay to the BCSC \$21.7 million; and
 - iii. under section 162 of the BC Act, that Lathigee pay to the BCSC an administrative penalty of \$15 million;

- (c) upon Mr. Pasquill:
- i. under sections 161(1)(d)(i), (b)(ii), (d)(ii) to (v) and (c) of the BC Act, respectively:
 1. Pasquill resign any position he holds as a director or officer of an issuer or registrant;
 2. Pasquill cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of the BCSC Order;
 3. Pasquill is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant;
 4. Pasquill is permanently prohibited from becoming or acting as a promoter;
 5. Pasquill is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
 6. Pasquill is permanently prohibited from engaging in investor relations activities; and
 7. except for those exemptions necessary to allow Pasquill to trade or purchase securities and exchange contracts for his own account, the exemptions set out in the BC Act, the regulations or any decision as defined in the BC Act, do not apply to Pasquill permanently;
 - ii. under section 161(1)(g) of the BC Act, that Pasquill pay to the BCSC \$21.7 million; and
 - iii. under section 162 of the BC Act, that Pasquill pay to the BCSC an administrative penalty of \$15 million.
- (d) FIC Projects, Lathigee and Pasquill be jointly and severally liable for \$9.8 million ordered under section 161(1)(g) of the BC Act and that no amount in excess of \$9.8 million be paid by them under the BCSC Order;
- (e) FIC Foreclosure, Lathigee and Pasquill be jointly and severally liable for \$9.9 million ordered under section 161(1)(g) of the BC Act and that no amount in excess of \$9.9 million be paid by them under the BCSC Order; and
- (f) WBIC, Lathigee and Pasquill be jointly and severally liable for \$2 million ordered under section 161(1)(g) of the BC Act and that no amount in excess of \$2 million be paid by them under the BCSC Order.

C. The Order Requested in the Public Interest

- [37] Staff seeks an order to prevent or limit the Respondents' participation in Ontario's capital markets.
- [38] Staff has established that the Respondents are subject to an order made by a securities regulatory authority that imposed sanctions upon them and thereby have established the threshold criteria set out in paragraph 4 of subsection 127(10) of the Act.

- [39] Staff has requested that a public interest order be made to meet the purposes of the Act as described in section 1.1, that is, to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.
- [40] In addition, the Act recognizes the importance of inter-jurisdictional co-operation. Paragraph 5 of section 2.1 provides that “the integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.”

D. Should an Order be made in Ontario?

- [41] Mr. Lathigee points out that he was granted leave to appeal on the BCSC’s disgorgement order and that he has appealed such order. He acknowledges that he has not appealed the underlying decision or the other sanctions that were imposed. He therefore remains subject to an order made by a securities regulatory authority within the meaning of paragraph 4 of subsection 127(10) of the Act.
- [42] Mr. Lathigee submits that Staff has not submitted any evidence that he presents a continuing threat to the public or that the BC sanctions have not been sufficient to achieve specific and general deterrence.
- [43] Mr. Lathigee submits that the public interest in Ontario does not require the imposition of sanctions in the absence of evidence of misconduct in Ontario or in any other jurisdiction.
- [44] Staff responds that Mr. Lathigee was found by the BCSC to have committed fraud and that the protection of Ontario investors and capital markets supports a reciprocal order. Staff points out that the Commission has not required a direct nexus of the wrongdoing with Ontario in its efforts to prevent wrongdoers from defrauding Ontario residents. Further, Staff submits that the Exempt Distribution Reports for FIC Foreclosure Fund and WBIC included as exhibits in the BC proceeding identified Ontario residents as participating in their offerings and therefore the fraud perpetrated by Mr. Lathigee.
- [45] Staff also submitted evidence that Mr. Lathigee had previously sought to participate in Ontario capital markets, having applied for registration in Ontario in 2008.
- [46] Staff submits that the BCSC Panel found the Respondents to present a “serious ongoing risk to the capital markets” and had embarked on business activities in the United States that resembled FIC Group’s mandate.
- [47] In a number of other decisions, the Commission has not required a nexus to Ontario when imposing an order of this nature. (See *Re Sundell* (2014), 37 O.S.C.B. 10755 at para. 37; *Re Bigfoot Recreation & Ski Area Ltd.* (2015), 38 O.S.C.B. 7370 at paras 13 and 21; *Re Ferguson* (2015), 38 O.S.C.B. 8849 at paras. 21 and 30; and *Re Powerwater Systems, Inc. et al.* (2015), 38 O.S.C.B. 2791 at para. 20.)
- [48] Although not necessary to support my conclusion in the face of the fraud found by the BCSC Panel to have been perpetrated by the Respondents, arguments that there is no nexus to Ontario must fail when Ontario residents were in fact investors in offerings by the Corporate Respondents, directed by Mr. Lathigee and Mr. Pasquill, that were the very subject of the BC proceeding.

- [49] Mr. Lathigee submits that, in the absence of such evidence, mere reliance on the misconduct likely constituting similar contraventions of Ontario securities law would result in an inappropriate “near-automatic imposition of sanctions, relying on subsection 127(10).” While some cases have considered whether the misconduct that was the subject of the original proceeding may result in contraventions of Ontario securities law, this is not a requirement under subsection 127(10) of the Act. Some panels may find it helpful in assessing whether an order is in the public interest by determining the likely outcome if such conduct had been the subject of a merits hearing in Ontario. In this case, the conduct for which the Respondents were sanctioned in British Columbia would have constituted a contravention of the *Securities Act* in Ontario, had it taken place here. The conduct is serious: it harmed investors; enriched the Respondents; and constituted a fraud.
- [50] Mr. Lathigee also objects to the order sought by Staff to the extent that it goes further than the BC Order by including a ban on acting as an investment fund manager as well as by not permitting carve-outs from the trading and director and officer bans to permit him to (i) trade from his own account through a registered dealer and (ii) to act as a director and officer of one private issuer whose securities are owned solely by him and his immediate family.
- [51] It is appropriate to make an order in the public interest to prevent such conduct in the capital markets in Ontario. Further, I agree with Staff that Mr. Lathigee and Mr. Pasquill should have no future involvement in Ontario capital markets, including as an investment fund manager, in addition to the scope of the BC sanctions.
- [52] However, I agree with Mr. Lathigee that the carve-outs permitted by the BCSC Panel should be incorporated in the order. This panel did not have a sufficient evidentiary basis to conclude that their allowance would pose risks in Ontario or to question the BC Panel’s exercise of discretion in this regard. I will extend these same carve-outs to Mr. Pasquill.
- [53] Finally, an order that is based upon an order of a securities regulatory authority in another jurisdiction is not made automatically; however, it is important to consider the need to be responsive to the interconnected cross-border securities industry and the realities of the mobility of funds, people and information.

III. ORDER

- [54] As a result of the above, I will make an order:
1. against Mr. Lathigee that:
 - (a) trading in any securities or derivatives by Mr. Lathigee shall cease permanently, pursuant to paragraph 2 of subsection 127(1) of the Act, except trades that are made for his own account through a registrant who has been first given a copy of the BCSC Order and a copy of the Order of the Commission in this proceeding;
 - (b) the acquisition of any securities by Mr. Lathigee is prohibited permanently, pursuant to paragraph 2.1 of subsection 127(1) of the Act, except acquisitions that are made for his own account through a registrant who has been first given a copy of the BCSC Order and a copy of the Order of the Commission in this proceeding;

- (c) any exemptions contained in Ontario securities law do not apply to Mr. Lathigee permanently, pursuant to paragraph 3 of subsection 127(1) of the Act, except for those exemptions necessary for him to trade or acquire securities for his own account;
 - (d) Mr. Lathigee resign any position he holds as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, except that he may act as a director or officer of one issuer whose securities are solely owned by him or by him and his immediate family members (being: Mr. Lathigee's spouse, parent, child, sibling, mother- or father-in-law, son- or daughter-in-law, or brother- or sister-in-law);
 - (e) Mr. Lathigee is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, except that he may act as a director or officer of one issuer whose securities are solely owned by him or by him and his immediate family members (being: Mr. Lathigee's spouse, parent, child, sibling, mother- or father-in-law, son- or daughter-in-law, or brother- or sister-in-law); and
 - (f) Mr. Lathigee is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter, pursuant to paragraph 8.5 of subsection 127(1) of the Act;
2. against Mr. Pasquill that:
- (a) trading in any securities or derivatives by Mr. Pasquill shall cease permanently, pursuant to paragraph 2 of subsection 127(1) of the Act, except trades that are made for his own account through a registrant who has been first given a copy of the BCSC Order and a copy of the Order of the Commission in this proceeding;
 - (b) the acquisition of any securities by Mr. Pasquill is prohibited permanently, pursuant to paragraph 2.1 of subsection 127(1) of the Act, except acquisitions that are made for his own account through a registrant who has been first given a copy of the BCSC Order and a copy of the Order of the Commission in this proceeding;
 - (c) any exemptions contained in Ontario securities law do not apply to Mr. Pasquill permanently, pursuant to paragraph 3 of subsection 127(1) of the Act, except for those exemptions necessary for him to trade or acquire securities for his own account;
 - (d) Mr. Pasquill resign any position he holds as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act;
 - (e) Mr. Lathigee is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager, pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act; and

- (f) Mr. Pasquill is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter, pursuant to paragraph 8.5 of subsection 127(1) of the Act;
3. against each of the Corporate Respondents that:
- (a) trading in any securities by the Corporate Respondents shall cease permanently, pursuant to paragraph 2 of subsection 127(1) of the Act;
 - (b) trading in any securities or derivatives by the Corporate Respondents shall cease permanently, pursuant to paragraph 2 of subsection 127(1) of the Act;
 - (c) the acquisition of any securities by the Corporate Respondents is prohibited permanently, pursuant to paragraph 2.1 of the Act; and
 - (d) any exemptions contained in Ontario securities law do not apply to the Corporate Respondents permanently, pursuant to paragraph 3 of subsection 127(1) of the Act.

Dated at Toronto this 16th day of May, 2017.

"D. Grant Vingoe"

D. Grant Vingoe