

**IN THE MATTER OF THE SECURITIES ACT
R.S.N.S. 1989, S. 135, AS AMENDED (the "Act")**

- and -

**IN THE MATTER OF
TRI CLEAN ENTERPRISES INC.
("Tri Clean")**

DECISION

Hearing Date: August 17, 2010

- 1 Enforcement staff of the Nova Scotia Securities Commission ("Staff") apply to the Nova Scotia Securities Commission for an order reciprocal to an order made by the Manitoba Securities Commission dated August 24, 2009 regarding an entity known as Tri Clean Enterprises Inc . ("Tri Clean"). Counsel for Staff appeared. No one appeared on behalf of Tri Clean.
- 2 Almost all of the Canadian provinces have their own securities commission. While each operates independently, certain arrangements have been made among them to avoid the duplication of effort with its attendant costs and delay. One such arrangement is provision for the commission in one province, through a summary procedure, to adopt an order made by a commission in another.
- 3 In this case, the Manitoba Commission found that Tri Clean had traded in securities without having been registered to do so in Manitoba, without a prospectus, without having obtained an exemption from registration and from filing a prospectus under the *Manitoba Securities Act*, and without having qualified those investors as people who by their means might be sold securities without registration or a prospectus, "accredited investors" so called. According to the evidence, 11 Manitobans had been contacted by telephone and purchases solicited of shares in a company which disposed of hazardous waste.
- 4 The sellers represented to those being solicited that the shares were being offered to accredited investors in a number of provinces including Manitoba and Nova Scotia pursuant to exemptions which had been implemented by securities commissions. The sellers never did make any inquiries of the potential investors to determine whether they met the criteria for an accredited investor and, in fact, only three of the purchasers would have qualified as accredited investors.

- 5 No one appeared on behalf of Tri-Clean at the Manitoba hearing. The Manitoba Commission ordered the following remedies under the *Manitoba Securities Act*:
- Tri Clean to pay compensation in various amounts to nine investors in the aggregate of \$197,500.00
 - Tri Clean to pay an administrative penalty of \$25,000.00
 - Tri Clean to pay the costs of the investigation and hearing in the amount of \$21,858.57
 - Tri Clean be permanently denied the exemptions provided to allow securities sales to qualified investors in Manitoba.
- 6 The Alberta Securities Commission, on January 4, 2010, made an order denying Tri Clean “all of the registration exemptions contained in Alberta securities laws ... permanently”.
- 7 Nova Scotia Staff seek a similar order in Nova Scotia. Since this is the first time a reciprocal order has been sought in Nova Scotia, it is appropriate to deal with the application in more detail than might be expected for future such applications. The various jurisdictions in Canada will, over the course of a year, make many orders. Most of those will have no relevance to Nova Scotia, and no one expects them all to become the subject of reciprocal orders here. Staff will, however, bring applications forward when they believe that a reciprocal order will serve the public interest in Nova Scotia.
- 8 In this case, Staff submitted an affidavit indicating Tri Clean solicited Nova Scotians in the same manner as in Manitoba, and again, without having registered itself in Nova Scotia, without having filed a prospectus, received an exemption or qualified the investors or reported the sales, all as required by law. Thus, Staff say, it is in the public interest that the Nova Scotia Securities Commission should permanently deny Tri Clean the benefit of any exemptions from registration that it might otherwise have qualified for.
- 9 Staff could have launched its own investigation and brought the violations forward to the Commission for an order. While this may have resulted in a broader remedy against Tri Clean in the form of administrative penalties and the award of costs, the reality is that such an investigation would be expensive, time consuming, and simply duplicate what the Manitoba

commission has done already.

- 10 The governing provisions of our *Securities Act*, R.S.N.S. 1989, c. 418 are as follows:

134(1) Where the Commission considers it to be in the public interest, the Commission, after a hearing, may order...

(a) that a person or company comply with or cease contravening, and that the directors and senior officers of the person or company cause the person or company to comply with or cease contravening,

(i) a provision of this Act or the regulations,

(ii) a decision, whether or not the decision has been made a rule or order of the Supreme Court of Nova Scotia, or

(iii) a by-law, rule or other regulatory instrument or policy or a direction, decision, order or ruling made under a by-law, rule, regulation or policy of a self-regulatory organization;

(b) that

(i) all persons or companies,

(ii) the person or company or persons or companies named or described in the order, or

(iii) one or more classes of persons or companies,

cease trading in a specified security or in a class of security;

(c) that any or all of the exemptions contained in Nova Scotia securities laws do not apply to a person or company permanently or for such period as is specified in the order;

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer, registrant or investment fund manager, and

(ii) is prohibited from becoming or acting as a director or officer of any issuer;

(e) that a registrant, issuer or investment manager

(i) is prohibited from disseminating to the public, or authorizing the dissemination to the public, of any information or record of any kind that is described in the order,

(ii) is required to disseminate to the public, by the method described in the order, any information or record relating to the affairs of the registrant or issuer or investment manager that the Commission considers must be disseminated, or

(iii) is required to amend, in the manner specified in the order, any information or record of any kind described in the order before disseminating the information or record to the public or authorizing its dissemination to the public;

(f) that the registration of a registrant is suspended, cancelled or restricted, subject to such terms and conditions as the Commission may impose, or that terms and conditions be imposed upon a registration;

(g) that a person or company is prohibited from becoming or acting as a registrant, investment fund manager or promoter; or

(h) that a person or company be reprimanded.

- 11 Subsection 134(1A) enables the Nova Scotia Securities Commission to adopt an order made by another jurisdiction:

The Commission may, after providing an opportunity to be heard, make an order under clauses (a) to (h) of subsection (1) against a person or company if the person or company

(c) has been found by a securities commission or other person or body empowered by statute to regulate trading in securities or to administer, regulate or enforce securities laws of another province of Canada to have contravened the securities laws of that province or territory; or ...

- 12 Making a reciprocal order is a summary procedure, but just the same, the principles of natural justice have to be fulfilled in each case. The first of these is notice to Tri Clean of the proceeding, the allegations

made against it and the date of the hearing. Staff filed an affidavit of service sworn by Stephanie Atkinson, Enforcement Counsel for Staff of the Nova Scotia Securities Commission. We find the form of the notice to be satisfactory. It states the date of the hearing, the legal basis for the application against Tri Clean, and attaches a statement of the allegations under the *Nova Scotia Securities Act* and the affidavit of Scott Peacock, Director of Enforcement. Ms. Atkinson sent the documents by courier to the President and Director of Tri Clean, that is John Caridi, to the last address the Commission has for Tri Clean, in Richmond Hill, Ontario, and to Tri Clean's Chief Financial Officer Marvin Winick at an address in Thornhill, Ontario. The courier service advised that it was unable to deliver the notice to Mr. Ciardi because Tri Clean was no longer at the address. Mr. Winick, however, did acknowledge receipt of the notice by signing the courier delivery slip.

- 13 The General Rules of Practice and Procedure provide the following with regard to service of notice:

5.1 Any notice or document required under the Rules to be served may be served by any means effective to deliver the notice or document or a copy thereof to the person or company being served or to that person's or company's counsel of record and shall be served no later than ten (10) days after the issuance of the notice or document. The notice or document shall be sufficiently served upon a person or company if it is served in accordance with this Part and is:

- a. personally served upon the person or company;
- b. sent to the person or company by prepaid mail at the last address of the person or company appearing on the records of the Commission or, if not so appearing, to such address as the Commission may direct; or
- c. given in such other manner as the Commission may direct.

A notice or document served in accordance with paragraph b. of this section shall be deemed to be received by the person or company on the fifth day after the day it is mailed

5.2 Personal service of a notice or document is effected on a body corporate by leaving a true copy of the notice or

document with the president, chairman, mayor, warden or other chief officer of the body corporation, or with the manager, secretary, city or town manager or clerk, cashier or other similar officer thereof, or in the manner provided by section 9 of the *Corporations Registration Act* (Nova Scotia).

- 14 These rules are permissive. Regardless of what they say, however, natural justice must be served and effective notice will always be a first consideration. The governing section of the *Nova Scotia Securities Act* says “The Commission may, after providing an opportunity to be heard,…” The provision of the opportunity is a function of the notice. The nature of the service to be insisted upon will vary with the nature of the process and the remedy sought. In this case, the remedy is simply the application of a permanent bar to exemptions for this entity. Tri Clean would still be free to proceed through the normal channels of marketing securities in the province, should it choose to do so. We note that Tri Clean has not appeared in response to the processes launched in other jurisdictions.
- 15 The notice was sent to the President of Tri Clean at an abandoned office and to the Chief Financial Officer of Tri Clean. We accept the delivery by courier and the receipt by the Chief Financial Officer, however, as being effective notice to Tri Clean.
- 16 Although section 134(1A) does not expressly state that the Commission must be satisfied that it is “in the public interest” before it makes an order under clauses (a) to (h) of subsection (1A), in our opinion, the public interest is invoked by opening words of the section itself. This implies that we are to be more than a rubber stamp for the orders of another jurisdiction, we are not simply exercising an administrative function, but rather as is our role, a judicial function. This will require evidence from Staff to substantiate the exercise of the jurisdiction Staff requests of us. Here we have the affidavit of the Staff Director of Enforcement, Mr. Scott Peacock. His affidavit relates that Tri Clean is not a reporting issuer with the Commission nor has it registered to trade securities in Nova Scotia. It has not filed a prospectus, nor made any reports of trades in Nova Scotia relying on exemptions. Mr. Peacock then states that he is informed by Abel Lazarus, a former investigator for the Commission, and does verily believe, that on or about September 9th, 2005 Tri Clean distributed securities to a Nova Scotia resident, and that on or about February 15, 2006, it distributed securities to two other residents.

- 17 In our view, it would have been better if Mr. Lazarus himself had provided the information, and the information had been more detailed. Mr. Lazarus can only speak to what he was told, or had determined, and Mr. Peacock can only speak to what Mr. Lazarus told him he was told or had determined. The evidence becomes double hearsay. At the same time, however, the threshold of evidence of the public interest will be lower than under section 134(1A) and we accept the information received from Mr. Lazarus as being sufficient.
- 18 If there were no evidence that anyone in Nova Scotia has been affected, or is likely to be affected, by some violation of another province's rules, or other sufficient reason relevant to Nova Scotia, then there would be no reason for the Commission to issue the reciprocating order. The question is the connection between the Manitoba order and Nova Scotia. If there were no connection, then the Manitoba order would be of little interest. As stated above, it is likely that relatively few of all orders issued across the country will be reciprocated.
- 19 The remedies available to the Nova Scotia Securities Commission through a reciprocal order are limited. They include the cessation of trading, the cessation of contraventions of the securities law and, as in this case, denying exemptions. The Nova Scotia Securities Commission does not have power at all, even after a proceeding of its own staff, to order compensation to investors who have lost money as was done in Manitoba.
- 20 Section 134(1A) does provide a number of remedies which staff have not sought on this application. Staff counsel explains that the application is intended, not so much to punish past behaviour by someone violating our securities laws, but rather to deter any future such activities by Tri Clean and to enable a ready response if there were any. It would have been helpful, however, for staff in their submissions to have elaborated on why only the remedy of denying exemptions has been requested.
- 21 We are, as a Commission, reluctant to become simply a rubber stamp whereby if an entity has been disciplined elsewhere, we simply issue the order, more or less because staff request it. We are charged with exercising an independent judicial function, and notwithstanding that we have only been asked to approve a reciprocal order, in future we ought to be provided with more direct information than has been provided by the affidavit on this first application.

22 We are quite satisfied, however, that there is sufficient connection with Nova Scotia to order that all of the registration exemptions contained in Nova Scotia securities laws do not apply to Tri Clean Enterprises Inc., permanently and we shall issue an order accordingly.

Date: October 5, 2010

For the Commission:



J. Walter Thompson, Q.C.

Paul E. Radford, Q.C.

John Morash, C.A.